DOCKET

No. 07-1309
Title: Edmund Boyle, Petitioner
v.
United States
Docketed: April 17, 2008
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (05-4239)
Decision Date: November 19, 2007
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Feb 4 2008	Application (07A653) to extend the time to file a petition for a writ of certiorari from February 17, 2008 to April 17, 2008, submitted to Justice Ginsburg.
Feb 6 2008	Application (07A653) granted by Justice Ginsburg extending the time to file until April 17, 2008.
Apr 15 2008	Petition for a writ of certiorari filed. (Response due May 19, 2008)
Apr 23 2008	Waiver of right of respondent United States to respond filed.
Apr 29 2008	DISTRIBUTED for Conference of May 15, 2008.
May 1 2008	Response Requested . (Due June 2, 2008)
May 30 2008	Order extending time to file response to petition to and including July 2, 2008.
Jul 2 2008	Brief of respondent United States in opposition filed.
Jul 8 2008	Reply of petitioner Edmund Boyle filed.
Jul 16 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Petition GRANTED.
Nov 7 2008	SET FOR ARGUMENT ON Wednesday, January 14, 2009.
Nov 10 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including November 21, 2008.
Nov 21 2008	Joint appendix filed. Statement of costs received.
Nov 21 2008	Brief of petitioner Edmund Boyle filed.
Nov 28 2008	CIRCULATED.
Nov 28 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Nov 28 2008	Brief amicus curiae of Center on the Administration of Criminal Law filed. (Distributed)
Nov 28 2008	Brief amici curiae of Chamber of Commerce of the United States of America, and McKesson Corporation filed. (Distributed)
Dec 18 2008	Record received from the U.S.D.C. for the Eastern Ditrict of New York.
Dec 22 2008	Brief of respondent United States filed. (Distributed)
Dec 29 2008	Brief amicus curiae of National Association of Shareholder and Consumer Attorneys filed. (Distributed)
Dec 31 2008	Record received from U.S.C.A. for the 2nd Circuit. (1 box)
Jan 6 2009	Reply of petitioner Edmund Boyle filed. (Distributed)
Jan 14 2009	Argued. For petitioner: Marc Fernich, New York, N.Y. For respondent: Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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PETITION
FOR
WRIT OF
CERTIORARI

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Supreme Court, U.S.
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No. 07-

In The

Supreme Court of the United States

OCTOBER TERM 2007

◆

EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages – an exceptionally important question in the administration of federal justice, civil and criminal, that has spawned a three-way circuit split?

List of Parties

Petitioner was indicted with Joseph Cerbone, Thomas Dono, Battista Geritano, Anthony Labarbera, John Labarbera, John Micali, Ronald Petrino and Joseph Spennato. He was tried alone on a redacted superseding indictment.

Table of Contents

Opinion Below 2

Jurisdiction 2

Statutory Provisions 2

District Court Jurisdiction 3

Statement of the Case 3

Reasons for Granting the Petition

I. The Court Should Hear This Case to Resolve an Important Question of Statutory Interpretation That Has Split the Federal Circuits Three Ways: Must an Association-In-Fact Enterprise Possess Some Ascertainable Structure Beyond That Inherent in the RICO Predicate Crimes it Commits? 7

A. Introduction 7

B. *United States v. Turkette* and the Distinctness Requirement 8

C. Turmoil in the Circuits 10

1. The Separate Structural View 10

2. The Seventh Circuit's Middle Course 12

3. The Single Element Approach 12

D. The Single Element Approach Obliterates the Distinctness Rule, Begging This Court's Intervention and Correction . 14

Conclusion 20

Appendix

Summary Order in *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) 1a

Table of Authorities

Page(s)

Cases:

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 19

Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738 (8th Cir. 2003) 10

Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46 (2d Cir. 1987) 19

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 19

Chang v. Chen, 80 F.3d 1293 (9th Cir. 1996), *abrogated by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) 15

Furman v. Cirrito, 828 F.2d 898 (2d Cir. 1987) 8, 16, 18, 19

H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 8, 19

Limestone Dev. Corp. v. Village of Lemont, Il., No. 07-1438, _ F.3d _, 2008 WL 852586 (7th Cir. April 1, 2008) . . . . *passim*

NOW, Inc. v. Scheidler, 510 U.S. 249 (1994) 7, 19

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.) (*en banc)*, *cert. denied*, 128 S. Ct. 464 (2007) . . . . . *passim*

Panix Promotions, Ltd. v. Lewis, No. 01-Civ. 2709 (HB), 2002 WL 72932 (S.D.N.Y. Jan. 17, 2002) 9

Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995) 12

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) . 9

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983), *abrogated on other grounds*, *NOW, Inc. v. Scheidler*, 510 U.S. 249 (1994) . . . . *passim*

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) 11, 15, 17

United States v. Boyle, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) 2

United States v. Cagnina, 697 F.2d 915 (11th Cir. 1983) 13

United States v. Errico, 635 F.2d 152 (2d Cir. 1980) 18

United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985) . . . . *passim*

United States v. Ianniello, 808 F.2d 184 (2d Cir. 1986) 18, 19

United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (*en banc*) 19

United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) . . 18

United States v. Korando, 29 F.3d 1114 (7th Cir. 1994) 15

United States v. Mazzei, 700 F.2d 85 (2d Cir. 1983) 16,18

United States v. Patrick, 248 F.3d 11 (1ST Cir. 2001) 12, 16

United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) 18

United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) 13, 15

United States v. Pimentel, 346 F.3d 285 (2d Cir. 2003) 17

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), *abrogated on other grounds, Griffin v. United States*, 502 U.S. 46 (1991) 11, 14, 18

United States v. Rogers, 89 F.3d 1326 (7th Cir. 1996) 12

United States v. Sanders, 928 F.2d 940 (10th Cir. 1991) 11

United States v. Tillett, 763 F.2d 628 (4th Cir. 1985) 11

United States v. Turkette, 452 U.S. 576 (1981) . . . . *passim*

Statutes and Rules:

18 U.S.C. § 371 3

18 U.S.C. § 1961(4) 2, 3, 15

18 U.S.C. § 1962(c) 2, 3, 8

18 U.S.C. § 1962(d) 3

18 U.S.C. § 2113(a) 3

28 U.S.C. § 1254(1) 2

No. 07A653

In The

Supreme Court Of The United States

October Term, 2007

EDMUND BOYLE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Edmund Boyle respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming his conviction on racketeering- and bank burglary-related charges; vacating his 151 month sentence (12.5 years) for an *ex post facto* violation; and remanding the case for resentencing before the United States District Court for the Eastern District of New York (Hon. Sterling Johnson Jr., J.). Resentencing is currently scheduled for April 18, 2008.

Opinion Below

The Court of Appeals' unpublished opinion, *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007), is reproduced in full at 1a *et seq.*[1]

Supreme Court Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). By Feb. 6 order, Justice Ginsburg extended the deadline for Boyle's *certiorari* petition to April 17. This petition timely follows.

Statutory Provisions

This petition concerns the interpretation of two provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), codified at 18 U.S.C. §§ 1961-68. The first, § 1962(c), states in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

---

[1] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" and "SPA:" refer, respectively, to pages of Boyle's Appendix and Special Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript.

The second provision at issue, 18 U.S.C. § 1961(4), defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, as relevant here, "any union or **group of individuals associated in fact** although not a legal entity." (Emphasis supplied.)

District Court Jurisdiction

Jurisdiction in the Eastern District of New York rested on various provisions of Title 18, U.S. Code, including, among others, §§ 371, 1962-63, 2113 and 3231.

Statement of the Case

A jury convicted Boyle of racketeering (18 U.S.C. § 1962(c)), racketeering conspiracy (18 U.S.C. § 1962(d)), bank burglary conspiracy (18 U.S.C. § 371) and several bank burglaries and attempted burglaries (18 U.S.C. § 2113(a)). (SPA: 1) The charges arose from the defendant's participation in a bank burglary ring, a putative association-in-fact enterprise under the RICO statute, that the government dubbed the "Boyle Crew." (A: 48)

The evidence at trial, viewed most favorably to the government, established that the "Boyle Crew" was a loosely affiliated "clique" of "friends" – wholly lacking role definition or organizational structure – who sporadically burgled night deposit boxes in shifting combinations. A: 400, 402 (prosecution witness characterizing "Crew" as an iteration of "all of the people named in the indictment basically"), 475-76, 648.

The government's own accomplice witnesses, testifying under cooperation agreements in exchange for leniency, described the purported "Crew" as an amorphous band of "free floaters" without unifying "plan" or "understanding" – ongoing, "formal," "informal" or otherwise. *See, e.g.,* T: 188, 193-94 (Christopher Ludwigsen a.k.a. Paciello ("Paciello")), 766 (Blas Salvatore "Fat Sal" Mangiavillano); A: 301, 503 (Gerard Bellafiore). Rather, "different people" would commit crimes at "different times" and "places" – on an "individual," *ad hoc* and impromptu basis – with no set "crew" or "group" backing. *See, e.g.,* T: 188, 193-94 (Paciello); A: 474-75 (Bellafiore), 648 (Bellafiore: no group "requirements").

More specifically, the cooperators variously admitted that:

- "Nobody had any type of standing where he was the boss...." T: 188 (Paciello).
- "[T]here was no organization ***at all.***" T: 188 (Paciello) (emphasis supplied); *accord* A: 503 (Bellafiore) (similar).
- "**Each individual crime withstood by itself.**" T: 188 (Paciello) (emphasis supplied).
- There was no "ongoing informal plan" among a "group of people to commit crimes so ... the group could profit." *Id.*

- Individual conspirators "did crimes together" but not "as a group." *Id.* (emphasis supplied).

- "[T]here was no leadership" or "informal understanding among the group." T: 193-94 (Paciello) (emphasis supplied); *accord* A: 503 (Bellafiore) (no "leader[s]" or "formal understanding").

- "[I]t was just who was available to do the job when it came up." T: 194 (Paciello); *accord* A: 474-77 (Bellafiore) (similar); T: 1329 (govt. rebuttal summation) ("These people ... commit ... bank crimes ... with a lot of different people, ... who[ever is] available").

Even the government conceded that the so-called "Boyle Crew" was functionally identical to the string of predicate crimes – the charged pattern of racketeering activity – in which its members engaged. At most, as the government's appeal brief acknowledged, the "Crew" amounted to a "group of individuals who associated together for the common purpose" of committing bank "burglaries." Govt. Br. at 49. "Driven by a collective motive to share in illicit proceeds," the government added, the Crew "target[ed] banks for financial gain," with some members "acting as lookouts" and others attempting to "remove" deposit boxes "using tools." *Id.*

At the close of the evidence, Boyle requested the following jury instruction:

> To establish an association-in-fact enterprise, the government must convince you, beyond a reasonable doubt, that the alleged Boyle Crew had an ongoing organization, a core membership that functioned as a continuing unit, and an **ascertainable structural hierarchy distinct from the charged predicate acts.** If the government fails to meet this burden, you must acquit Mr. Boyle on the RICO counts.

A: 683 (citations and footnote omitted) (emphasis supplied).

The District Court denied the request, telling the jury, over objection (A: 693), just the opposite: "you may find an enterprise where an association of individuals, ***without* structural hierarchy**, forms solely for the purpose of carrying out a pattern of racketeering acts." A: 771-72 (emphasis supplied).

Boyle challenged the Court's instruction on appeal, arguing that the government's enterprise evidence was legally insufficient – failing to prove a valid association-in-fact distinct from the alleged RICO pattern – under the correct standard embodied in his proposed charge. The Court of Appeals rejected the claim without discussion,[2] presumably relying on circuit precedent. *See, e.g., United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985) ("RICO charges may be proven even when the enterprise and predicate acts are functionally equivalent") (citations and internal quotes omitted) (emphasis supplied); *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983) ("We have upheld application of RICO ... where the enterprise was, in effect, **no more than the sum of the predicate acts**") (emphasis supplied), *abrogated on other grounds*, *NOW, Inc. v. Scheidler*, 510 U.S. 249 (1994).

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[2] *See* 3a ("We have considered the appellant's other challenges to the judgment of conviction and find them without merit.").

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD HEAR THIS CASE TO RESOLVE AN IMPORTANT QUESTION OF STATUTORY INTERPRETATION THAT HAS SPLIT THE FEDERAL CIRCUITS THREE WAYS: MUST AN ASSOCIATION-IN-FACT ENTERPRISE POSSESS SOME ASCERTAINABLE STRUCTURE BEYOND THAT INHERENT IN THE RICO PREDICATE CRIMES IT COMMITS?

A. INTRODUCTION

At least two current members of this Court – Justices Scalia and Kennedy – have warned that RICO's breadth and "vagueness" raise "intolerable" constitutional concerns:

> No constitutional challenge to this law has been raised in the present case, ... so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more

> than ... meager guidance bodes ill for the day when that challenge is presented.

H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255-56 (1989) (Scalia, J., concurring in the judgment).[3]

The blanket rule embraced by the Second Circuit in *Ferguson* and *Bagaric* and implicitly ratified in this case – that an association-in-fact enterprise is functionally equivalent to the sum of its predicate acts – compounds and magnifies the concerns expressed by Justices Scalia and Kennedy. It stretches the statutory net even further, conflating RICO's separate pattern and enterprise components, eliminating an essential element of the offense or claim – that of a perceptible and identifiable enterprise – and drastically reducing the burden of proof. If the Second Circuit rule prevails, then Boyle's RICO convictions stand. If it falls they crumble. We ask the Court to accept this case, strike down the rule and clarify what the statute makes "plain" – the enterprise is the "organizational vehicle by or through which the racketeering activity is undertaken," and it is "improper" to merge the two – toppling Boyle's RICO convictions in the process. *Furman v. Cirrito*, 828 F.2d 898, 908 (2d Cir. 1987) (Pratt, J., dissenting).

B. *UNITED STATES v. TURKETTE* AND THE DISTINCTNESS REQUIREMENT

To establish a § 1962(c) violation, a prosecutor or plaintiff must prove "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) (footnote omitted). In the "seminal"[4] case of *United States v. Turkette*, this Court addressed the relationship between elements two, three and four, stressing that "[i]n order to secure a conviction under RICO, the [g]overnment must prove **both** the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'" 452 U.S. 576, 583 (1981) (emphasis supplied). An association-in-fact "enterprise," the Court took pains to explain, is a

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[3] Justices Kennedy and O'Connor, along with then-Chief Justice Rehnquist, joined in Justice Scalia's opinion.

> group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, **proof of one does *not* necessarily establish the other. The "enterprise" is *not* the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times**

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[4] *Panix Promotions, Ltd. v. Lewis*, No. 01-Civ. 2709 (HB), 2002 WL 72932, at *5 (S.D.N.Y. Jan. 17, 2002).

> **remains a separate element which *must* be proved by the government.**

Id. (citation and footnote omitted) (emphasis supplied). *See also, e.g., Odom v. Microsoft Corp.*, 486 F.3d 541, 549 (9th Cir.) (*en banc*) ("the terms refer to two concepts that are 'separate and apart' from one another: The 'enterprise' is the actor, and the 'pattern of racketeering activity' is an activity in which that actor engages") (quoting *Turkette*, 452 U.S. at 583), *cert. denied*, 128 S. Ct. 464 (2007).

C. TURMOIL IN THE CIRCUITS

As the *en banc* Ninth Circuit recently observed, *Turkette*'s "explanation of the meaning of an associated-in-fact enterprise" has not been "clearly understood," bedeviling the "lower courts" and sowing rampant judicial "[c]onfusion." *Id.* at 549. Surveying the muddled legal landscape, *Odom* discerned a three-way circuit split on the issue.

1. The Separate Structural View

According to *Odom*, four circuits have read *Turkette* to require some kind of "ascertainable organizational structure" separate and "beyond" that necessary to "engage in the pattern of illegal racketeering activity," *id.* – exactly what Boyle's request to charge demanded. Falling into this camp, again according to *Odom*, are the following:

- EIGHTH CIRCUIT: *See, e.g., Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("enterprise must have ... an ascertainable structure distinct from the pattern of racketeering"); *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (organizational "system of authority beyond" that "necessary to perpetrate the predicate crimes").

- TENTH CIRCUIT: *See, e.g., United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991) (evidence of an "ascertainable structure" existing "apart from the commission of racketeering acts").

- FOURTH CIRCUIT: *See, e.g., United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985) (proof of an organization and "existence beyond that ... necessary to commit the predicate crimes") (citations omitted).

- THIRD CIRCUIT: *See, e.g., United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983) (existence "beyond that ... necessary merely to commit each of the acts charged as predicate racketeering offenses"), *abrogated on other grounds*, *Griffin v. United States*, 502 U.S. 46 (1991).

2. The Seventh Circuit's Middle Course

The Seventh Circuit – alone among its peers – takes a similar but slightly different approach. According to *Odom*, that court requires "'some' kind of ascertainabl[y] structure[d]" enterprise, though not necessarily one "separate" from the pattern of predicate crimes. 486 F.3d at 550. Examples include *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995), calling for proof of "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making" (citation and internal quotes omitted); *United States v. Rogers*, 89 F.3d 1326, 1337-38 (7th Cir. 1996), mandating "some" structure but not "purposes or goals separate and apart from the pattern of racketeering activity"; and *Limestone Dev. Corp. v. Village of Lemont, Il.*, No. 07-1438, _ F.3d _, 2008 WL 852586, at *6-*7 (7th Cir. April 1, 2008), a recent opinion by Judge Posner reaffirming *Richmond* and collecting similar authorities.

3. The Single Element Approach

In contrast to the Third, Fourth, Seventh, Eighth and Tenth Circuits, the Second Circuit and several others have "rejected" any ascertainable structure requirement – divorced from the pattern or not – for an association-in-fact enterprise. *Odom*, 486 F.3d at 550. Belonging to this school, the *Odom* Court reports, are the following:

- FIRST CIRCUIT: *See, e.g., United States v. Patrick*, 248 F.3d 11, 19 (1ST Cir. 2001) (refusing to "import" an ascertainable structure requirement "[s]ince Congress intended the term 'enterprise' to include both legal and criminal enterprises, and because the latter may not observe the niceties of legitimate organizational structures") (citation omitted).

- D.C. CIRCUIT: *See, e.g., United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir. 1988) (enterprise established by "common purpose among the participants, organization, and continuity").

- ELEVENTH CIRCUIT: *See, e.g., United States v. Cagnina*, 697 F.2d 915, 921 (11th Cir. 1983) (declining to require a "distinct, formalized structure").

- SECOND CIRCUIT: *See, e.g., Bagaric*, 706 F.2d at 56 ("it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure").

A divided Ninth Circuit, sitting *en banc*, went on to join this faction in *Odom*, holding that "an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." 486 F.3d at 551 (emphasis supplied). In reaching this conclusion, the majority adopted the First Circuit's rationale in *Patrick*: that "criminal enterprises 'may not observe the niceties of legitimate organizational structures.'" *Id.* (quoting *Patrick*, 248

F.3d at 19). A different result, it opined, would "necessitate" an enterprise structure serving both legal and "illegal" ends – "precisely" what *Turkette* held RICO "*not* [to] require." *Id.*

D. THE SINGLE ELEMENT APPROACH OBLITERATES THE DISTINCTNESS RULE, BEGGING THIS COURT'S INTERVENTION AND CORRECTION

The position of this contingent – the First, Second, Ninth, Eleventh and D.C. Circuits – fundamentally misconstrues *Turkette*, dangerously expanding RICO's already immense and much-maligned scope. It is one thing to recognize, as this Court did in *Turkette*, that the "proof used to establish" the independent pattern and enterprise "elements may in particular cases coalesce." 452 U.S. at 583. It is quite another to hold, as does this cluster of circuits, that if two or more "parties perform a series of 'predicate acts'" for their mutual "benefit," they "*ipso facto* constitute an 'enterprise.'" *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result).

This theory would transform every "run-of-the-mill conspiracy" (*id.*) into an automatic RICO violation, with its enhanced criminal penalties and the *in terrorem* threat of treble damages. *Cf., e.g., Riccobene*, 709 F.2d at 221 (without structured enterprise, "federal prosecutors could use the [statute] to invoke an additional penalty" in any case involving commission of two offenses "listed as 'racketeering activities'"). As Judge Posner recently remarked, "[t]hat does not make good sense, and [can]not [be] the law":

> **[A] conspiracy is *not* a RICO enterprise unless it has some enterprise-like structure.**
>
> ***
>
> The juxtaposition of the two [statutory] phrases ["associated in fact" and "although not a legal entity," 18 U.S.C. § 1961(4)] suggests that **"associated in fact"** just **means structured without the aid of legally defined structural forms such as the business corporation.** The inference is reinforced by the fact that before "any union or group of individuals associated in fact" in the statute appears a list of legal entities. **Without a requirement of structure, "enterprise" collapses to "conspiracy."**

Limestone Dev. Corp., 2008 WL 852586, at *2, *6 (emphasis supplied).[5]

Many other courts agree with Judge Posner's analysis. *See, e.g., Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996) (conspiracy "**not an enterprise**" within RICO's purview) (emphasis supplied), *abrogated by Odom*; *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994) (quality of "structure" distinguishes enterprise from "mere conspiracy"); *Perholtz*, 842 F.2d at 363 ("The same group of individuals who repeatedly commit predicate offenses do not necessarily constitute an enterprise. An extra ingredient is required: organization.") (emphasis supplied); *Bledsoe*, 674 F.2d at 665 (enterprise connotes more than common purpose shared by "wrongdoers" committing crimes through "concerted action").

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[5] Judge Posner's original quote, "That does not make good sense, and is not the law," referred to an argument about RICO's statute of limitations. But it applies equally to his discussion of the pattern/enterprise distinction.

In contending otherwise, the Second Circuit and its concurring sisters effectively hold that the pattern is the enterprise for RICO purposes – that they are one and the same, essentially synonymous. *See, e.g.*, *Ferguson*, 758 F.2d at 853 ("**functionally equivalent**") (citations and internal quotes omitted) (emphasis supplied); *Bagaric*, 706 F.2d at 55 ("We have upheld application of RICO ... where the enterprise was, in effect, **no more than the sum of the predicate acts**") (emphasis supplied). This tack mistakenly blends two discrete but related inquiries, writing the key enterprise element out of the statute, diluting the burden of persuasion and confounding *Turkette*'s clear thrust. *See, e.g. United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983) ("*Turkette* requires the government to prove **both** the existence of an 'enterprise' and a 'pattern of racketeering activity.'") (emphasis supplied); *Turkette*, 452 U.S. at 583 (enterprise, an entity "apart" from the pattern, "at all times remains a separate element [that] **must be proved**"; evidence of one "does not necessarily establish the other") (emphasis supplied); *Furman*, 828 F.2d at 908 ("improper to conflate" pattern and enterprise) (Pratt, J., dissenting).

Whatever its exact contours, the distinctness rule enunciated in *Turkette* plainly contemplates some degree of organizational hierarchy, structure and role definition. *See, e.g., Turkette*, 452 U.S. at 583 (enterprise entails "evidence of an ongoing organization"); *Patrick*, 248 F.3d at 19 (gang had "older members who instructed younger ones, its members referred to the gang as family, and it had 'sessions' where important decision were made"); *United States v. Pimentel*, 346 F.3d 285, 288-89 (2d Cir. 2003) (prison gang with "complex, hierarchical structure," "strict rules of behavior that are brutally enforced," central governing "committee," and local network of "chapters" and officers). The Court should take this opportunity to clarify the requisite showing – to say what the appropriate degree is.

As for the claim that our position impermissibly narrows RICO's intended sweep "because criminal enterprises 'may not observe the niceties of legitimate organizational structures,'"[6] the answer is simple: the statute "targets a more sophisticated crowd." *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result). Contrary to the *Odom* majority's apparent assumption, RICO was not meant to reach any and all "criminal enterprises." *Id.* at 551 (majority opinion). Rather, as *Turkette* instructs, its declared purpose was to eradicate "*organized* crime," 452 U.S. at 589 (citation omitted) (emphasis supplied) – enduring and entrenched criminal groups with at least some "minimal structure, coordination, or ordering principle." *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result). Conversely, the statutory focus was never on "individuals merely associated" together for the commission of *ad hoc* or "sporadic crime." *Bledsoe*, 674 F.2d at 665; *accord, e.g., United States v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992) (contrasting RICO enterprises with "individuals who associate for the commission of sporadic harm").

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[6] *Odom*, 486 F.3d 551 (quoting *Patrick*, 248 F.2d at 19).

Against this legislative backdrop, it is the First, Second, Ninth, Eleventh and D.C. Circuit view that extends RICO liability to "situations far removed from those actually contemplated by Congress," *Riccobene*, 709 F.2d at 221 – not Boyle who would artificially compress the statute's rightful ambit. At any rate, contrary to *Odom*'s and *Patrick*'s tacit premise, no one suggests that criminal confederacies must "observe" the formal "niceties" of "legitimate organization[s]" to qualify as RICO enterprises. *Odom*, 486 F.3d at 551 (citation and internal quotes omitted). All we urge – and all the Third, Fourth, Seventh, Eighth and Tenth Circuits prescribe – is some "ascertainable structural hierarchy" beyond the charged "predicate acts." A: 683 (Boyle's proposed charge) (citations and footnote omitted).

Finally, it bears mention that many of the early cases shunning any structural requirement – for example, *Mazzei* and *United States v. Errico*, 635 F.2d 152 (2d Cir. 1980) – were decided when RICO's basic parameters were unsettled and still in flux, the concepts of relatedness and continuity generally considered attributes of the enterprise rather than the pattern. *See, e.g., Furman*, 828 F.2d at 907-10 (Pratt, J., dissenting); *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986). During this transitional phase, some courts also adorned the enterprise element with "multiple scheme" and "economic motive" requirements.

See, e.g., Furman, 828 F.2d at 808 (Pratt, J., dissenting); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983).

Collectively, these interpretive glosses – relatedness and continuity, multiple schemes and economic motive – served as alternate means of ensuring an enterprise's "ongoing organization," arguably mitigating any need for further distinctness between pattern and enterprise. *Turkette*, 452 U.S. at 583; *see Ianniello*, 808 F.2d at 190-91 (expressing similar view). But with their subsequent repudiation by this Court – at least in the enterprise context – the single element approach endorsed by the First, Second, Ninth, Eleventh and D.C. Circuits should be reexamined and rebuked. *See, e.g., H.J., Inc.*, 492 U.S. 229; *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*); *Scheidler*, 510 U.S. 249. Concomitantly, compelling plaintiffs and prosecutors to plead and prove more "plausible" enterprises comports with this Court's evolving – and increasingly restrictive – conception of antitrust law, RICO's original template. *See, e.g., Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965-67, 1973-74 (2007); *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 477 (2006).

CONCLUSION

Boyle's petition should be granted.

Respectfully submitted,
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On the Petition:
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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the accompanying *certiorari* petition contains approximately 3822 words, excluding the parts of the document exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed April 14, 2008

Marc Fernich

MARC FERNICH

APPENDIX

Appendix A

Court of Appeals Decision

Slip Copy, 2007 WL 4102738

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(Decided: November 19, 2007)

Docket No. 05-4239-cr.

UNITED STATES OF AMERICA,

Appellee,

v.

EDMUND BOYLE,

Defendant-Appellant.

Marc Fernich , New York, NY, for Defendant-Appellant.

Joey Lipton (Peter A. Norling , of counsel), Assistant United States Attorneys, for Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York, Brooklyn, NY, for Appellee.

Present JOSEPH M. McLAUGHLIN , ROBERT A. KATZMANN, Circuit Judges, NICHOLAS G. GARAUFIS, District Judge.[1]

SUMMARY ORDER

*1 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of conviction is AFFIRMED, but the case is REMANDED for resentencing.

Defendant Edmund Boyle appeals the judgment of conviction and sentence imposed by the United States District Court for the Eastern District of New York (Johnson, J.). Boyle was convicted following a jury trial of racketeering, racketeering conspiracy, bank burglary, bank burglary conspiracy, and attempted bank burglary. We assume the parties' familiarity with the underlying facts and procedural history in this case and the issues raised on appeal.

The appellant contends that his due process rights were violated because the government advanced a theory of criminal liability in this case that was factually inconsistent with one pursued by the government in a previous action: In this case the government argued that the robbery of a National Westminster Bank branch in Brooklyn, New York on February 3, 1994 constituted a predicate act in furtherance of the Boyle Crew enterprise, whereas the government in a prior case contended that the same robbery was a predicate act in furtherance of a different enterprise, the New Springfield Boys enterprise.

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[1] The Honorable Nicholas G. Garaufis, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Although we have not yet addressed the issue, other circuits have found that "the use of inherently factually contradictory theories violates the principles of due process." *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000); *accord Stumpf v. Mitchell*, 367 F .3d 594, 611 (6th Cir. 2004), *vacated on other grounds, Bradshaw v. Stumpf*, 545 U.S. 175 (2005). This case does not, however, present the opportunity for us to consider the issue. Contrary to appellant's assertion, the government's two theories are not "factually contradictory." Nothing dictates that a single crime cannot be committed by two enterprises working together, each in furtherance of its own interests. Indeed, the indictment in this action and the indictment in the prior action both charged that the crime was committed by the defendants "together with others." Because a single racketeering act may be in furtherance of the activities of two different enterprises, the government has not contradicted itself. Accordingly, the appellant's conviction does not even implicate concerns of due process.

We have considered the appellant's other challenges to the judgment of conviction and find them without merit.

With respect to the appellant's challenge to the district court's sentence of 151 months' imprisonment, we agree that the district court erred in applying the version of the United States Sentencing Guidelines in effect at the time of sentencing rather than the version in effect at the time of the offense. As a general matter, a sentencing court should apply the version of the Sentencing Guidelines in effect as of the date of sentencing. *See*

United States v. Keigue, 318 F.3d 437, 442 (2d Cir.2003). An exception applies, however, when the Guidelines in effect at the time of sentencing call for a more severe sentence than the Guidelines in effect at the time of the offense; in such circumstances, the Ex Post Facto Clause requires the use of the earlier version of the Guidelines. *United States v. Kilkenny*, 493 F.3d 122, 126-27 (2d Cir. 2007). In the instant case, the charged offenses ended no later than August 28, 2003, and the Sentencing Guidelines in effect at that time permitted the district court to reduce Boyle's sentence to take into account the 33 months that the appellant served on his New York state conviction for two burglaries constituting "relevant conduct." U.S.S.G. § 5G1.3 cmt. n. 7 (2002) (amended 2003). Amendments to the Guidelines that became effective November 1, 2003 (and therefore were in place at the time of sentencing) foreclosed consideration of these burglaries as "relevant conduct" because they did not result in an increase in the offense level on the instant offense. See U.S.S.G. §§ 5G1.3 , 5K2.23 (2004). As the appellant's request for a reduction in sentence for the time he served on the state burglary offenses was rejected expressly based on a provision of the Sentencing Guidelines that took effect after his offenses, the district court's retrospective application of the revised Guidelines worked to the disadvantage of the appellant, violating the Ex Post Facto Clause. *See Miller v. Florida*, 482 U.S. 423, 431 (1987). Accordingly, the appellant must be resentenced using the Sentencing Guidelines in effect at the time of the criminal offense.

*2 For the foregoing reasons, we AFFIRM the district court's judgment of conviction, but REMAND for resentencing.

OPPOSITION BRIEF

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FILED

JUL 2 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1309

In the Supreme Court of the United States

EDMUND BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in order to establish the existence of an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, the government must prove the existence of an entity with an ascertainable structure apart from the pattern of racketeering activity in which it engages.

TABLE OF CONTENTS

Page
Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Arthur v. *United States*, 534 U.S. 1043 (2001) 8
Bridge v. *Phoenix Bond & Indem. Co.*, No. 07-210 (July 9, 2008), slip op. 20 7
Chang v. *Chen*, 80 F.3d 1293 (9th Cir. 1996), overruled by *Odom* v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir.), cert. denied, 128 S. Ct. 464 (2007) 8
Kirillov v. *United States*, 534 U.S. 1043 (2001) 8
Odom v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir.), cert. denied, 128 S. Ct. 464 (2007) 7, 8
Miller v. *Florida*, 482 U.S. 423 (1987) 5
NOW v. *Scheidler*, 510 U.S. 249 (1994) 3
United States v. *Bledsoe*, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1982) 8
United States v. *Darden*, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149, and 518 U.S. 1026 (1996) 8
United States v. *Golden Indus. Inc.*, 219 F.3d 1271 (11th Cir.), cert. denied, 531 U.S. 1015 (2000) 7
United States v. *Korando*, 29 F.3d 1114 (7th Cir.), cert. denied, 513 U.S. 993 (1994) 8

Cases—Continued: Page

United States v. *Mazzei*, 700 F.2d 85 (2d Cir.), cert. denied, 461 U.S. 945 (1983) 8

United States v. *Patrick*, 248 F.3d 11 (1st Cir.), cert. denied, 534 U.S. 1043 (2001), and 535 U.S. 910 (2002) 7, 8

United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir.), cert. denied, 488 U.S. 821 (1988) 8

United States v. *Pelullo*, 964 F.2d 193 (3d Cir. 1992) 8

United States v. *Tocco*, 200 F.3d 401 (6th Cir. 2000) 8

United States v. *Turkette*, 452 U.S. 576 (1981) . . . 3, 6, 7, 8

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 5

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*:

    18 U.S.C. 1961(4) 3

    18 U.S.C. 1962(c) 1, 2, 3

    18 U.S.C. 1962(d) 2

18 U.S.C. 2113(a) 2

18 U.S.C. 371 2

In the Supreme Court of the United States

No. 07-1309

EDMUND BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not reported but is available at 2007 WL 4102738.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2007. On February 6, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 17, 2008, and the petition was filed on April 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c); conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); conspiracy to commit bank burglary, in violation of 18 U.S.C. 371; and eight counts of bank burglary or attempted bank burglary, in violation of 18 U.S.C. 2113(a). He was sentenced to 151 months of imprisonment. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-4a; Gov't C.A. Br. 1-2.

1. Petitioner was one of a crew of approximately eight men based in the New York City area who engaged in a string of bank burglaries in at least five States between 1991 and 1999. The crew would scout out banks that had a specific type of night deposit box they had learned to break into. The crew, which frequently communicated via walkie-talkies, focused on banks in areas with retail businesses, like shopping malls, which were likely to receive a high volume of cash deposits. Members of the crew, including petitioner, would burglarize those boxes in the early morning hours at the beginning of the week using crowbars, screwdrivers, fishing gaffs, and other burglar's tools. Each participant had a particular role as a lookout or burglar, and the members of the crew would protect their identities by referring to each other using false names. The crew members split the proceeds of the burglary based on the amount of risk inherent in each participant's role. Gov't C.A. Br. 6-12.

2. In 2003, a federal grand jury returned an indictment charging petitioner and other members of the crew with, among other offenses, violating 18 U.S.C. 1962(c). Section 1962(c), which was enacted as part of the Racketeer Influenced and Corrupt Organizations Act (RICO), provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign com-

> merce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Ibid. RICO defines an "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In *United States* v. *Turkette*, 452 U.S. 576 (1981), this Court held that "an enterprise includes any union or group of individuals associated in fact," *id.* at 580, and that the existence of an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit," *id.* at 583. See also *NOW* v. *Scheidler*, 510 U.S. 249, 259 (1994) ("[T]he 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed.").

Tracking the language of RICO and *Turkette*, the district court in this case instructed the jury that the term "enterprise"

> includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.
>
> * * * * *
>
> Moreover, you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an

> ongoing organization, formal or informal, and that by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.
>
> Regarding "organization," it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise.

C.A. App. 771-772.

Petitioner objected to the court's instruction that an enterprise could be established "without structural hierarchy," C.A. App. 693, and that the enterprise's organization need not "have any particular or formal structure," *id.* at 694. Petitioner asked the district court instead to instruct that the government had to prove beyond a reasonable doubt that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." *Id.* at 683. The district court rejected petitioner's request. *Id.* at 770-771.

The jury found petitioner guilty of racketeering, conspiracy to commit racketeering, conspiracy to commit bank burglary, bank burglary, and attempted bank burglary. Pet. App. 2a. He was sentenced to 151 months of imprisonment. *Id.* at 3a.

3. The court of appeals affirmed petitioner's conviction but vacated his sentence. Pet. App. 1a-4a.

Petitioner argued, *inter alia*, that the district court's instructions were erroneous because they failed to require the government to establish that petitioner's enterprise had "an ascertainable structural hierarchy distinct from the charged predicate acts." Pet. C.A. Br. 19-20. The court of appeals did not discuss that issue, stating only that it "considered [petitioner]'s other challenges to the judgment of conviction and find them without merit." Pet. App. 3a.

The court of appeals vacated petitioner's sentence because, based on an application note added to the Sentencing Guidelines two months *after* the conclusion of his charged conduct, the district court had denied petitioner credit for 33 months of imprisonment he had served on a New York state burglary conviction. The court of appeals determined, in light of *Miller* v. *Florida*, 482 U.S. 423 (1987), that the denial of credit based on the post-conduct change violated the Ex Post Facto Clause. Pet. App. 3a-4a.

4. On remand, the district court credited petitioner the aforementioned 33 months and otherwise reimposed the same sentence. Amended Judgment (Apr. 18, 2008). Petitioner has appealed that judgment, and the appeal is pending before the court of appeals.

ARGUMENT

Petitioner claims that the court of appeals erred by refusing to hold that a RICO enterprise must have an "ascertainable organizational structure separate and beyond that necessary to engage in the pattern of illegal racketeering activity." Pet. 10 (internal quotation marks and citation omitted). That claim lacks merit, and the court of appeals' decision does not conflict with any decision of this Court. To the extent that the courts of appeals disagree, any disagreement appears to be both superficial and limited. In any event, this case is not a proper vehicle to resolve any such disagreement. Accordingly, no further review is warranted.

1. Petitioner argues that the district court's instructions, omitting an "ascertainable structure" requirement, allowed the jury to conflate the "enterprise" and "pattern" requirements of Section 1962(c), in contravention of *United States* v. *Turkette*, 452 U.S. 576 (1981). Although the Court in *Turkette* held that the enterprise is "separate and apart" from the pattern of racketeering activity, it recognized that "the proof used to establish these separate elements may in particular cases coalesce." *Id.* at 583. Moreover, the jury instructions here made clear that the government had to prove *both* the existence of a RICO enterprise and a pattern of racketeering activity. C.A. App. 770 (describing those requirements as independent elements). In defining the term "pattern of racketeering activity," the district court discussed "the requisite relationship between the RICO enterprise and a predicate racketeering act," *e.g.*, that the pattern of acts have "furthered the purpose of the enterprise," thereby further conveying their distinct but related nature. *Id.* at 778-779.

Importantly, no "ascertainable structure" requirement is found in either *Turkette* or RICO's text. In *Turkette*, the Court stated that an enterprise can consist merely of "a group of persons associated together for a common purpose of engaging in a course of conduct," established "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583. The jury instructions here tracked that language nearly word-for-word. C.A. App. 770-772. An additional "ascertainable structure" requirement would be inconsistent with *Turkette*'s recognition that RICO covers both legitimate and illegitimate enterprises, 452 U.S. at 581-582, since an associated-in-fact criminal enterprise "may not observe the niceties of legitimate organizational structures." *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir.) (quoting *United States* v. *Patrick*, 248 F.3d 11, 19 (1st Cir.), cert. denied, 534 U.S. 1043 (2001), and 535 U.S. 910 (2002)), cert. denied, 128 S. Ct. 464 (2007). That RICO's text does not include any "ascertainable structure" requirement confirms the correctness of the jury instructions. As this Court recently reiterated, it is "not at liberty to rewrite RICO to reflect * * * views of good policy" where "RICO's text provides no basis for imposing a * * * requirement." *Bridge* v. *Phoenix Bond & Indemnity Co.*, No. 07-210 (June 9, 2008), slip op. 20.

2. The Second Circuit's adherence to *Turkette* and rejection of an "ascertainable structure" requirement is consistent with decisions of at least four other circuits. In *Odom*, the Ninth Circuit recently held that "an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." 486 F.3d at 551. See *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir.) (reaffirming that "the definitive factor in determining the existence of a RICO enterprise is the existence of an association of individual entities, however loose or informal, that furnishes a vehicle for the commission of two or more predicate crimes"), cert. denied, 531 U.S. 1015

(2000); *Patrick*, 248 F.3d at 18-19; *United States* v. *Perholtz*, 842 F.2d 343, 364 (D.C. Cir.) (approving jury instruction stating "[i]t is not necessary that the enterprise, if it existed, have any particular or formal structure") (internal quotation marks and citation omitted), cert. denied, 488 U.S. 821 (1988); *United States* v. *Mazzei*, 700 F.2d 85, 88-90 (2d Cir.), cert. denied, 461 U.S. 945 (1983).

Although some other courts of appeals require proof that the alleged RICO enterprise has an "ascertainable structure," those courts generally apply this requirement in a manner consistent with *Turkette*, which held that a RICO enterprise must be an "ongoing organization" composed of associates who "function as a continuing unit," 452 U.S. at 583. See, *e.g.*, *United States* v. *Tocco*, 200 F.3d 401, 425 (6th Cir. 2000) ("Continuity of structure exists where there is an organizational pattern * * * that provides a mechanism for directing the group's affairs on a continuing, rather than ad hoc, basis.") (citation omitted); *United States* v. *Korando*, 29 F.3d 1114, 1117-1118 (7th Cir.) ("[T]he continuity of an informal enterprise, and the differentiation of roles can provide the necessary 'structure' to satisfy RICO's statutory requirement."), cert. denied, 513 U.S. 993 (1994). The circuits that have adopted an "ascertainable structure" requirement also accept that, as this Court held in *Turkette*, 452 U.S. at 583, the same evidence can establish both the existence of a RICO enterprise and a pattern of racketeering activity. See, *e.g.*, *United States* v. *Darden*, 70 F.3d 1507, 1521 (8th Cir. 1995), cert. denied, 517 U.S. 1149, and 518 U.S. 1026 (1996); *United States* v. *Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992). The "ascertainable structure" requirement, therefore, would rarely, if ever, produce a different result than the straightforward test from *Turkette* to which the Second Circuit adheres. And petitioner identifies no case with facts analogous to those in this case in which the ascertainable structure test has led to a reversal.

This Court consistently has denied petitions for certiorari raising the same issue in the past. See, *e.g.*, *Odom*, 128 S. Ct. 464 (2007); *Arthur* v. *United States*, 534 U.S. 1043 (2001); *Kirillov* v. *United States*, 534 U.S. 1043 (2001). There is no reason for a different result now.

3. Even assuming that such superficial and limited disagreement merits this Court's attention, this case is a poor vehicle to resolve any such disagreement for at least two independent reasons.

First, the court of appeals' decision is an unreported, per curiam, summary order. Pet. App. 1a-4a. It does not even mention the issue on which petitioner seeks this Court's review, let alone analyze it. Rather, after addressing petitioner's first, unrelated contention on appeal that his due process rights were violated because the government advanced inconsistent theories, the court of appeals conclusorily rejected all of petitioner's

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Of the cases petitioner cites as imposing an "ascertainable structure" requirement (Pet. 10-16), only two appear to have found it not satisfied. See *Chang* v. *Chen*, 80 F.3d 1293, 1300-1301 (9th Cir. 1996); *United States* v. *Bledsoe*, 674 F.2d 647, 665-667 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). Neither creates a clear conflict. *Chang* has been overruled by the Ninth Circuit. See *Odom*, 486 F.3d at 551. As to *Bledsoe*, it is quite possible that the court's finding of "no real evidence of * * * a pattern of authority or control, or of continuity in the pattern of association or the common purpose of all of the defendants" would have required reversal under *Turkette*, without resort to the "ascertainable structure" test; in any event, the court noted that reversal of the RICO convictions was warranted on independent grounds. 674 F.2d at 667 & n.11.

other claims (including presumably the one raised in the present petition) in a single sentence. *Id.* at 3a ("We have considered the appellant's other challenges to the judgment of conviction and find them without merit."). The Court therefore lacks the benefit of the court of appeals' consideration of the question presented in the context of this case.

Second, even if the RICO statute did require proof that the alleged RICO enterprise had an ascertainable structure (which it does not), the evidence introduced at petitioner's trial would satisfy that requirement. Members of petitioner's crew had particular roles in their spree of burglaries (which could be characterized as an hierarchy), protected their identities with false names, divided their profits, and retained tools of the trade. Gov't C.A. Br. 6-12. They engaged in illegal activities crossing five non-contiguous States, reflecting a degree of sophistication and experience typical of ongoing criminal organizations and beyond that necessarily accompanying any joint criminal activity. *Id.* at 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2008

REPLY
BRIEF

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③

FILED

JUL 8 - 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1309

In The

Supreme Court of the United States

OCTOBER TERM 2007

◆

EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO GOVERNMENT BRIEF OPPOSING *CERTIORARI* PETITION

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Table of Contents

Reply Argument 1

Conclusion 9

Table of Authorities

Page(s)

Cases:

Bell v. Kelly, 128 S. Ct. 2108 (2008) 7

Chang v. Chen, 80 F.3d 1293 (9th Cir. 1996), *abrogated by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) 8

Hudson v. Michigan, 545 U.S. 1138 (2005) 7

Limestone Dev. Corp. v. Village of Lemont, Il., 520 F.3d 797 (7th Cir. 2008) 2, 8

Mandel v. United States, 445 U.S. 961 (1980) 6

McNally v. United States, 483 U.S. 350 (1987) 6

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.) (*en banc*), *cert. denied*, 128 S. Ct. 464 (2007) 2, 3, 8

Old Chief v. United States, 519 U.S. 172 (1997) . . . 6

Pryba v. United States, 498 U.S. 924 (1990) 6

Salinas v. United States, 522 U.S. 52 (1997) 6

Samson v. California, 545 U.S. 1165 (2005) 7

Scheidler v. NOW, Inc., 545 U.S. 1151 (2005) 7

Smith v. United States, 429 U.S. 925 (1976) 6

Teague v. Lane, 489 U.S. 288 (1989) 5, 6

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) 3, 4, 9

United States v. Carver, 260 U.S. 482 (1923) 5

United States v. Flores-Montano, 540 U.S. 945 (2003) 7

United States v. Korando, 29 F.3d 1114 (7th Cir. 1994) 8

United States v. Lacy, No. 95-10398, 87 F.3d 1324, 1996 WL 327095 (9th Cir. June 13, 1996) 4

United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) 3, 4

United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) 8

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), *abrogated on other grounds, Griffin v. United States*, 502 U.S. 46 (1991) 8

United States v. Turkette, 452 U.S. 576 (1981) 3

No. 07-1309

In The
Supreme Court Of The United States
October Term, 2007

EDMUND BOYLE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

REPLY TO GOVERNMENT BRIEF OPPOSING *CERTIORARI* PETITION

The government's reasons for opposing *certiorari* in this case are unpersuasive.

First, its characterization of the circuit split at issue as "superficial and limited"[1] strains credulity. As demonstrated at pages 10-14 of our petition, at least four federal circuits – the Third, Fourth, Eighth and Tenth – require that a valid RICO enterprise have an ascertainable structure distinct from the pattern of racketeering in which it engages. Another five circuits – the First, Second, Ninth, Eleventh and District of Columbia – flatly reject any such requirement, while a sixth – the Seventh Circuit alone among its peers – steers a middle course. A more direct, fully-developed conflict is hard to imagine.

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[1] Brief for the U.S. in Opposition to Edmund Boyle's Petition for a Writ of *Certiorari*, filed July 2, 2008 ("Opp."), at 6, 9.

Second, in asserting that an ascertainable structure requirement would defy the truism that "RICO covers both legitimate and illegitimate enterprises,"[2] the government merely begs the question. For as several members of the *en banc* Ninth Circuit countered in *Odom v. Microsoft Corp.*, that objection is easily met: while many "criminal enterprises may not observe the niceties of legitimate organizational structures," the statute nonetheless "targets a more sophisticated crowd." 486 F.3d 541, 551, 555 (9th Cir.) (*en banc*) (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result) (citation and internal quotes omitted), *cert. denied*, 128 S. Ct. 464 (2007); *accord, e.g., Limestone Dev. Corp. v. Village of Lemont, Il.*, 520 F.3d 797, 804-05 (7th Cir. 2008) (Posner, J.) ("'associated in fact' just means structured without the aid of legally defined structural forms such as the business corporation").

In contrast to the government's apparent position, we thus contend that RICO was not meant to reach any and all "criminal enterprises." *Odom*, 486 F.3d] at 551 (majority opinion). Rather, as our petition further explains, its declared purpose was to eradicate

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[2] Opp. at 7 (citation omitted).

> "*organized* crime," [*U.S. v. Turkette*,] 452 U.S. [576,] 589 [(1981)] (citation omitted) (emphasis supplied) – enduring and entrenched criminal groups with at least some "minimal structure, coordination, or ordering principle." *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result). Conversely, the statutory focus was never on "individuals merely associated" together for the commission of *ad hoc* or "sporadic crime." [*U.S. v.*] *Bledsoe*, 674 F.2d [647,] 665 [(8th Cir. 1982)]; *accord, e.g., U.S. v. Pelullo*, 964 F.2d 193, 212 (3d Cir. 1992) (contrasting RICO enterprises with "individuals who associate for the commission of sporadic harm"). ... At any rate, ... **no one suggests that criminal confederacies must "observe" the formal "niceties" of "legitimate organization[s]" to qualify as RICO enterprises**. *Odom*, 486 F.3d at 551 (citation and internal quotes omitted). All we urge – and all the Third, Fourth, Seventh, Eighth and Tenth Circuits prescribe – is **some** "ascertainable structural hierarchy" beyond the charged "predicate acts." A: 683 (Boyle's proposed charge) (citations and footnote omitted).

Edmund Boyle's Petition for a Writ of *Certiorari*, filed April 15, 2008, at 17-18 (additional emphasis supplied).

The foregoing debate, about reconciling a structural hierarchy requirement with RICO's covering legitimate and illegitimate enterprises alike, is the very issue that splintered the *Odom* Court and has long confounded its sister circuits. And it is the very issue on which we seek *certiorari*. It is no answer to invoke the same debate, as the government circularly does, as grounds for denying Boyle's petition.

Third, while the government would downplay the circuit conflict here as more theoretical than real – complaining that we identify no "analogous" case "in which the ascertainable structure test has led to a reversal"[3] – research shows that courts have indeed found the issue outcome-determinative. *See, e.g., U.S. v. Lacy*, No. 95-10398, 87 F.3d 1324, 1996 WL 327095, at **1 (9th Cir. June 13, 1996) (affirming dismissal of RICO charges, under pre-*Odom* standard advocated here, for failure to allege an enterprise "structure" beyond that "inherent in the predicate racketeering acts"); *cf., e.g., Bledsoe*, 674 F.2d at 667 (reversing RICO convictions partly because there was "no real evidence of a structure [or] pattern of authority or control"); *Pelullo*, 964 F.2d at 210-12 (same where, *inter alia*, jury instruction failed to require an enterprise "separate and apart from the pattern of activity in which it engages," among other flaws).

In any event, the relative rarity of criminal reversals for insufficient enterprise proof is unsurprising, as ascertainable structure is a "question[] of fact" for a properly instructed jury, whose findings command great deference on appeal. *Id.* at 211 (citation omitted). The threshold question, of course – and the main one pressed here – is what constitutes a "proper instruction" in the first place. Moreover, criminal reversals aside, Boyle's argument also has broad implications in the civil RICO context – implications that he is perfectly competent to explore and present to this Court.

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[3] Opp. at 8-9 (footnote omitted).

Fourth, this Court has long recognized that the "denial of a writ of *certiorari* imparts no expression of opinion on the merits of a case." *U.S. v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.). It follows that the purported denial of other petitions allegedly "raising the same issue" simply has no bearing here. *See* Opp. at 9 (citations omitted). And for good reason: the "variety of considerations" underlying such "denials" – *e.g.*, insufficient development of an issue among the lower courts; waiver; mootness; different petitions raising different arguments regarding the same issue – "counsels against according denials of *certiorari* any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (citation and internal quotes omitted). Boyle's case illustrates the point. There is no indication, for example, that the argument raised at pages 18-19 of his petition – early RICO cases shunning enterprise structure were decided when other statutory glosses, since discredited, served as a structural proxy – was previously before this Court. The government's position on this score thus contravenes a basic tenet of Supreme Court jurisprudence: the non-precedential effect of *certiorari* denials.

At any rate, for substantially similar reasons – namely, the "variety of considerations"[4] just rehearsed – it is not unusual for this Court to "consistently"[5] deny *certiorari* on a given issue only to grant the writ later. To the contrary, research reveals that this is a regular occurrence. *Compare, e.g., Smith v. U.S.*, 429 U.S. 925 (1976) (denying *certiorari* in case holding that defendant had no right to stipulate to prior felony conviction in federal gun trial) with *Old Chief v. U.S.*, 519 U.S. 172 (1997) (addressing same issue, after granting *certiorari*, and recognizing such a right); *Mandel v. U.S.*, 445 U.S. 961 (1980) (denying *certiorari* in case holding that mail fraud statute proscribes schemes to defraud citizens of intangible right to honest services) with *McNally v. U.S.*, 483 U.S. 350 (1987) (addressing same issue, after granting *certiorari*, and reaching opposite conclusion); *Pryba v. U.S.*, 498 U.S. 924 (1990) (denying *certiorari* on issue whether RICO conspiracy requires personal commission of, or agreement to personally commit, two or more predicate acts) with *Salinas v. U.S.*, 522 U.S. 52 (1997) (addressing same issue, after granting *certiorari*, and holding it does not).

Fifth, it is equally unremarkable for this Court to grant *certiorari* petitions, like Boyle's, emanating from "unreported, *per curiam*, summary order[s]." Opp. at 9-10. In fact, the Court routinely does just that – and as recently as this past term – unpublished appellate opinions spawning some of its most consequential decisions. *See, e.g.*, *Bell v. Kelly*, 128 S. Ct. 2108 (2008); *Samson v. Ca.*, 545 U.S. 1165 (2005); *Scheidler v. NOW, Inc.*, 545 U.S. 1151 (2005); *Hudson v. Michigan*, 545 U.S. 1138 (2005); *U.S. v. Flores-Montano*, 540 U.S. 945 (2003). Contrary to the government's suggestion, then, the lack of detailed appellate "consideration" in a particular "case"[6] rarely deters this Court from granting *certiorari* where, as here, an issue is otherwise ripe for review. On the government's odd theory, lower courts could shield their opinions from further judicial scrutiny merely by leaving them unpublished, effectively freezing the law in time. To state this proposition is to reject it.

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[4] *Teague*, 489 U.S. at 296 (citation and internal quotes omitted).

[5] Opp. at 9.

Sixth, citing only its own appellate brief, the government insists that "the evidence introduced at [Boyle's] trial" – ostensibly showing meager role differentiation, profit-sharing and the use of aliases and burglar's tools – sufficed to satisfy any ascertainable structure requirement. Opp. at 3, 10. This characterization of the record is both disputed and self-serving, belied by the government's own accomplice testimony excerpted at pages 3-5 of our petition. More significantly, it was never passed on below because the jury was not instructed on the structural hierarchy requirement. As such, it deserves no deference here, and is properly addressed to the Court of Appeals in the first instance – for purposes of conducting harmless error analysis and/or fashioning an appropriate remedy – upon any reversal and remand.

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[6] Opp. at 10.

Even more fundamentally, the generic attributes the government touts as structural proof – participants variously acting as "lookout[s] or burglar[s]," using aliases and "burglar's tools," and splitting proceeds[7] – are staples of **any** ongoing bank burglary conspiracy. The government's position thus conflates the discrete concepts of conspiracy and enterprise, making every "run-of-the-mill conspira[tor]"[8] an automatic racketeer facing enhanced criminal penalties and the threat of treble damages. *Cf., e.g., U.S. v. Riccobene*, 709 F.2d 214, 221 (3d Cir. 1983) (without structured enterprise, "federal prosecutors could use the [statute] to invoke an additional penalty" in any case involving commission of two offenses "listed as 'racketeering activities'"), *abrogated on other grounds*, *Griffin v. U.S.*, 502 U.S. 46 (1991). To borrow Judge Posner's phrase, "[t]hat does not make good sense, and [can]not [be] the law." *Limestone Dev. Corp.*, 520 F.3d at 801, 804-05 ("a conspiracy is not a RICO enterprise unless it has some enterprise-like structure... Without a requirement of structure, 'enterprise' collapses to 'conspiracy'"); *accord, e.g., Chang v. Chen*, 80 F.3d 1293, 1300 (9th Cir. 1996) (conspiracy "not an enterprise" within RICO's purview), *abrogated by Odom*; *U.S. v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994) (quality of "structure" distinguishes enterprise from "mere conspiracy"); *U.S. v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988) ("The same group of individuals who repeatedly commit predicate offenses do not necessarily constitute an enterprise. An extra ingredient is required: organization."); *Bledsoe*, 674 F.2d at 665 (enterprise connotes more than common purpose shared by "wrongdoers" committing crimes through "concerted action").

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[7] *See* Opp. at 3.

[8] *Odom*, 486 F.3d at 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., concurring in the result).

CONCLUSION

For the reasons stated here and in Boyle's petition, *certiorari* should be granted.

Respectfully submitted,

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CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the accompanying *certiorari* petition contains approximately 1808 words, excluding the parts of the document exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed July 8, 2008

MARC FERNICH

JOINT
APPENDIX

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Supreme Court, U.S.
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No. 07-1309

In The

Supreme Court of the United States

OCTOBER TERM 2008

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EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari filed April 15, 2008.
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TABLE OF CONTENTS TO APPENDIX

Page

Relevant Docket Entries From the Eastern District Court in USA v. Boyle et al 1

Relevant Docket Entries From the United States Court of Appeals for the Second Circuit 12

Redacted Superseding Indictment 13

Excerpts From the Trial Transcript 30

Summary Order in *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) ..... Pet. App. 1a

U.S. District Court
Eastern District of New York (Brooklyn)
CRIMINAL DOCKET FOR CASE
#: 1:03-cr-00970-SJ-MDG All Defendants

Case Title: USA v. Boyle et al

Date Filed: 08/28/2003
Date Terminated: 08/02/2005

Date File	#	Docket Text
09/09/2003	1	SEALED INDICTMENT as to Edmund Boyle (1) count(s) 1, 2, 3-4, 5-9, 11-13, Joseph Cerbone (2) counts(s) 1, 2, 3, 14-18, 25-29, Thomas Dono (3) count(s) 1, 2, 3, 5-8, 10-11, 13, 32 Battista Geritano (4) counts(s) 1, 2, 3, 33, Anthony Labarbera (5) count(s) 3, 14-15, John Labarbera (6) count(s) 3, 33, John Micali (7) count(s) 1, 2, 3, 7-8, 10-22, 24-32, Ronald Petrino (8) count(s) 3-4, 5-8, Joseph Spennate (9) count(s) 1, 2, 3, 14-15, 17-18, 22, 26-29. Received on 8/28/2003 (Joe, Victor)(Entered 09/09/2003)
04/01/2004	127	MOTION to Dismiss by Thomas Dono. (Fernandez, Erica) (Entered: 05/13/2004)
04/01/2004	128	MEMORANDUM OF LAW in Support by Thomas Dono re 127 MOTION to Dismiss (Fernandez, Erica)(Entered: 05/13/2004)
04/01/2004	129	MOTION to Dismiss by Edmund Boyle. (Fernandez, Erica) (Entered: 05/13/2004)

05/11/2004	119	GOVERNMENT'S MEMORANDUM IN RESPONSE TO DEFTS' PETRIAL MOTIONS, filed by US. (Fernandez, Erica) (Entered: 05/11/2004)
05/17/2004	137	RESPONSE TO GOVT OPPOSITION TO DEFT'S MOTION TO DISMISS ACT ONE OF COUNT ONE DEFT Edmund Boyle re 129 MOTION to Dismiss. (Fernandez, Erica) (Entered: 05/28/2004)
06/04/2004	151	Minute Entry for proceedings held before Sterling Johnson Jr.: Pretrial Conference as to Thomas Dono, Ronald Petrino, Edmund Boyle Held on June 4, 2004. Attorneys for deft Boyle: Martin Geduldig & John Meringolo
08/09/2004	174	Minute Entry for proceedings held before Sterling Johnson Jr.: Pretrial Conference as to Thomas Dono, Ronald Petrino, Edmund Boyle held on 8/9/2004; AUSA Joseph Lipton; Defts present with counsel; Motion conference held on Govt's motion to quash subpoena; arguments heard, motion granted; Speedy trial info entered, start 8/9/04 and stop 2/28/05; Jury Selection and trial set for 2/28/2005 at 09:30AM before Senior-Judge Sterling Johnson Jr; Motions terminated as to Thomas Dono, Ronald Petrino, Edmund Boyle : 127 MOTION to Dismiss filed by Thomas Dono, 129 MOTION to Dismiss filed by Edmund Boyle, 123 MOTION to Dismiss *the Indictment and for the joining in all motions of co-defendants as they may be applicable to the defense of Ronald Petrino* filed by Ronald Petrino. (Court

		Reporter Marsha Diamond.) (Fernandez, Erica) (Entered: 08/24/2004)
01/06/2005	206	SUPERSEDING INDICTMENT as to Edmund Boyle (1) count(s) 1s-2s, 3s, 4s-9s, 11s,-13s, Thomas Dono (3) count(s) 1s-2s, 3s, 5s-8s, 10s-11s, 13s-14s, Ronald Petrino (8) counts(s) 3s, 4s-8s. (Fernandez, Erica) (Entered: 01/20/2005)
02/28/2005	219	Letter From Gov't to Defendant Regarding Redacted Superseding Indictment (Attachments: #1 Redacted Superseding Indictment)(Lipton, Joseph) (Entered: 02/28/2005)
03/01/2005	220	Letter From Gov't to Defendant Regarding Response to Objection to Proposed Redacted Superseding Indictment (Lipton, Joseph) (Entered: 03/01/2005)
03/02/2005	222	Letter From Gov't to Court Regarding Ruling on Proposed Redacted Superseding Indictment for Submission to Jury (Attachments: # 1 Proposed Redacted superseding Indictment) (Lipton, Joseph) (Entered: 03/02/2005)
03/08/2005		Minute Entry for proceedings held before Sterling Johnson Jr.: Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government Jury Trial as to Edmund Boyle held on 3/7/2005, Voir Dire begun on 3/7/2005 Edmund Boyle (1) on Count 1,1s-2s,2,3-4,3s,4s-9s,5-9,11-13,11s-13s, Voir Dire held on 3/7/2005 as to Edmund Boyle.

	Jurors sworn. Government and Defendant opens. Jury Trial set for 3/8/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Ron Tolkin.) (Marziliano, August) Modified on 3/8/2005 (Marziliano, August). (Entered: 03/08/2005)
03/09/2005	Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government Jury Trial as to Edmund Boyle held on 3/8/2005 Jury Trial set for 3/9/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Ron Tolkin.) (Marziliano, August) (Entered: 03/09/2005)
03/10/2005	Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government Jury Trial as to Edmund Boyle held on 3/9/2005 Jury Trial set for 3/10/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Ron Tolkin.) (Marziliano, August) (Entered: 03/10/2005)
03/11/2005	Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government Jury Trial as to Edmund

		Boyle held on 3/10/2005 Jury Trial set for 3/14/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Diana Pereira.) (Marziliano, August) (Entered: 03/11/2005)
03/11/2005	229	Proposed Jury Instructions by USA as to Edmund Boyle (Lipton, Joseph) (Entered: 03/11/2005)
03/16/2005		Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government Jury Trial as to Edmund Boyle held on 3/16/2005 Jury Trial set for 3/14/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Fred Guerino.) (Marziliano, August) (Entered: 03/16/2005)
03/16/2005		Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government. Charging conference held. Government rests. Defendant's rule 29 motion argued and denied. The defendant calls his case Jury Trial as to Edmund Boyle held on 3/15/2005 Jury Trial set for 3/16/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Fred Guerino.) (Marziliano, August) (Entered: 03/16/2005)

03/17/2005	Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government. Jury Trial as to Edmund Boyle held on 3/16/2005. Defendant rests. Summations. Court charges jury. Jury Trial set for 3/17/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Fred Guerino.) (Marziliano, August) (Entered: 03/17/2005)
03/17/2005	Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government Jury Trial as to Edmund Boyle held on 3/17/2005. Deliberations continue. Jury Trial set for 3/18/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Fred Guerino.) (Marziliano, August) (Entered: 03/17/2005)
03/21/2005	Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government. Jury Trial as to Edmund Boyle held on 3/18/2005. Deliberations continue. Jury Trial set for 3/21/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court

		Reporter Fred Guerino.) (Marziliano, August) (Entered: 03/21/2005)
03/21/2005	231	JURY VERDICT as to Edmund Boyle (1) Guilty on Count 1s-2s,3s,5s-9s,10s-12s Edmund Boyle (1) Not Guilty on Count 4s. The Jury also finds that $40,000.00 was derived from as a result of RICO activities as to count one and two of the indictment, and $40,000.00 was derived from proceeds traceable to the bank burglary conspiracy activities charged in Count Three of the indictment. This verdict was based on a redacted superseding indictment. The actual counts vary from the superseding indictment filed in this case. (Marziliano, August) Modified on 3/21/2005 (Marziliano, August). (Entered: 03/21/2005)
03/22/2005		Minute Entry for proceedings held before Sterling Johnson Jr.:Case called. Defendant in custody appears with counsel John C. Meringolo and Martin Geduldig. AUSAS Joseph Lipton and Thomas Seigel appear for the Government.Jury Trial as to Edmund Boyle held on 3/21/2005. Deliberations continue and end. The Jury returns with a verdict of Guilty on Count 1s-2s,3s,5s-9s,10s-12s Edmund Boyle (1) Not Guilty on Count 4s. The Jury also finds that $40,000.00 was derived from as a result of RICO activities as to count one and two of the indictment, and $40,000.00 was derived from proceeds traceable to the bank burglary conspiracy activities charged in Count Three of the indictment. This verdict was based on a redacted superseding indictment. The actual counts vary from the

		superseding indictment filed in this case. Sentencing set for 6/10/2005 09:30 AM in Courtroom 4 before Senior-Judge Sterling Johnson Jr.. (Court Reporter Tony Mancuso.) (Marziliano, August) (Entered: 03/22/2005)
03/22/2005	232	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/7/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. Present for deft. Court Reporter: Ron Tolkin. (Fernandez, Erica) (Entered: 03/22/2005)
03/22/2005	233	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/8/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. and John Meringdo Present for deft. Court Reporter: Holly Driscoll. (Fernandez, Erica) (Entered: 03/22/2005)
03/22/2005	234	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/9/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. and John Meringdo, Esq. Present for deft. Court Reporter: Holly Driscoll. (Fernandez, Erica) (Entered: 03/22/2005)
03/22/2005	235	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/10/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. and John Meringold Present for deft. Court Reporter: Diana Pereira. (Fernandez, Erica) (Entered: 03/22/2005)

03/22/2005	236	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/14/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. and John Meringold, Esq. present for deft. Court Reporter: Fred Guerino. (Fernandez, Erica) (Entered: 03/22/2005)
03/22/2005	237	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/14/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. and John Meringold, Esq. present for deft. Court Reporter: Fred Guerino. (Fernandez, Erica) (Entered: 03/22/2005)
03/22/2005	238	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/15/05 before Judge Johnson. AUSA Joseph Lipton, Thomas Seigel; Martin Geduldig, Esq. and John Meringold Present for deft. Court Reporter: Fred Guerino. (Fernandez, Erica) (Entered: 03/22/2005)
05/12/2005	250	TRANSCRIPT of Trial as to Edmund Boyle held on 3/21/05 before Judge Johnson. AUSAs Thomas Seigel and Joey Lipton; Martin Geduldig, Esq. and John J.C. Meringolo, Esq.; Court Reporter: Anthony M. Mancuso. (Fernandez, Erica) (Entered: 05/12/2005)
07/25/2005		Minute Entry for proceedings held before Sterling Johnson Jr.: Case called. Defendant in custody appears with counsel Martin Geduldig and John Meringolo. AUSA Loseph Lipton appears for the Government. Sentencing held on 7/22/2005 for Edmund

Boyle (1), Count(s) 1, 11-13, 2, 3-4, 5-9, Dismissed on Motion of the Government.; one hundred and fifty one (151) months on counts 1s,2s,5s-9s, 11s-13s, and sixty (60) months on count 3s. Terms of imprisonment to run concurrent to each other for a total of one hundred and fifty one (151) months. If it is determined on appeal that the Court can credit the defendant with time spent on defendant's expired State Court sentence, then the Court will amend the Judgment to reflect that change after the Court of Appeals renders a decision. 3 years supervised release.$1100.00 special assessment. $80,000.00 Order of Forfeiture. On Count 4s the jury found the defendant not guilty and a Judgment of acquittal is entered. The defendant shall be placed in a substance abuse treatment program while in custody. If it is possible that such a program is in FCI Fort Dix, the Court will recommend that the defendant be placed in that institution.(Court Reporter Holly Drsicoll.) (Marziliano, August) (Entered: 07/25/2005)

08/02/2005	258	JUDGMENT as to Edmund Boyle (1), Count(s) 1, 11-13, 2, 3-4, 5-9, Dismissed on Motion of the Government.; Count(s) 11s-13s, one hundred and fifty one (151) months on counts 1,2,5-9, 11-13, and sixty (60) months on count 3. Terms of imprisonment to run concurrent to each other for a total of one hundred and fifty one (151) months. If it is determined on appeal that the Court can credit the defendant with time spent on defendant's expired State Court sentence, then the Court will amend the Judgment to

		reflect that change after the Court of Appeals renders a decision. 3 years supervised release.$1100.00 special assessment. $80,000.00 Order of Forfeiture.; . Ordered by Judge Sterling Johnson Jr. on 7/22/05. c/m by chambers (3 certified copies fwd to USMS) (Fernandez, Erica) (Entered: 08/02/2005)
08/02/2005	259	NOTICE OF APPEAL re 258 Judgment. The Defendant appeals the judgment that was entered on 8/2/05. No Fee paid for the Deft has a CJA attorney. Please Note: This NOA was originally filed on 7/22/05. (Gonzalez, Mary) (Entered: 08/05/2005)
09/07/2005	262	TRANSCRIPT of Sentencing Proceedings as to Edmund Boyle held on 7/22/05 before Judge Johnson. Reporter: Holly Driscoll. (Vaughn, Terry) (Entered: 09/07/2005)
10/27/2005	263	TRANSCRIPT of Proceedings as to Edmund Boyle held on 3/7/05 before Judge Johnson. AUSAs Joseph Lipton and Thomas Siegel; Martin Geduldig, Esq., John JC Meringdo, Esq. and Marc Fernich, Esq. present for deft; Court Reporter: Ronald E. Tolkin. (Fernandez, Erica) (Entered: 10/27/2005)
12/11/2007	283	MANDATE of USCA (certified copy) as to Edmund Boyle re 259 Notice of Appeal - Final Judgment. The judgment of the District Court is affirmed, but the case is REMANDED for Resentencing. (email send to Case Manager). Issued as mandate on 12/10/2007 (Gonzalez, Mary) (Entered: 12/13/2007)

General Docket
US Court of Appeals for the Second Circuit

Court of Appeals Docket #: 05-4239-cr

USA v. Boyle Filed 8/5/2005

8/5/2005	Copy of notice of appeal and district court docket entries on behalf of APPELLANT Edmund Boyle, filed. [Entry date Aug 152005] [RO]
6/29/06	APPELLANT Edmund Boyle, brief FILED with proof of service. [Entry date Jun 29 2006] [RO]
6/29/06	APPELLANT Edmund Boyle, appendix filed w/pfs. 2VLS. [Entry date Jun 29 2006] [RO]
10/10/06	APPELLEE USA United States of America, brief and appendix filed with proof of service. [Entry date Oct 10 2006] [RO]
11/30/06	APPELLANT Edmund Boyle, reply brief filed with proof of service. [Entry date Dec 18 2006] [RO]
11/19/07	Judgment filed; judgment of the district court is AFFIRMED the district's judgement of conviction, but REMAND for resentencing by detailed order of the court without opinion filed. (RAK) [Entry date Nov 19 2007] [RO]
12/10/07	Judgment MANDATE ISSUED. CLOSED [Entry date Dec 10 2007] [RO]

MEF:TJS:JL
F.# 2003R01942

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - -X
UNITED STATES OF AMERICA

- against -
EDMUND BOYLE,

also known as "Edward"
and "Eddie,"

Defendant.

- - - - - - - - - - - - - - - - -X

SUPERSEDING
INDICTMENT

Cr. No.03-970 (S-1) (SJ)

(T. 18, U.S.C., §§ 371,
1962(c), 1962(d), 1963,
2113(a), 2, 981(a)(1)(C)
and 3551 et seq.; T. 21,
U.S.C., § 853; T. 28,
U.S.C., § 2461(c))

THE GRAND JURY CHARGES:

At all times relevant to this superseding indictment, unless otherwise indicated:

The Enterprise

1. In or about and between November 1993 and August 28, 2003, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," and others, hereinafter referred to as the "Boyle Crew," constituted an "enterprise" as defined by Title 18, United States Code, Section

1961(4), that is, a group of individuals associated in fact. The Boyle Crew constituted an ongoing organization whose members and associates functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. The Boyle Crew was engaged in, and its activities affected, interstate commerce. The Boyle Crew was an organized criminal group that operated in the Eastern District of New York and elsewhere.

2. The primary goals of the Boyle Crew included generating money for its members and associates through the commission of criminal activity, including bank robberies, bank burglaries and interstate transportation of stolen money.

3. The defendant EDMUND BOYLE, also known as "Edward" and "Eddie," participated in the operation and management of the Boyle Crew. The defendant EDMUND BOYLE participated in unlawful and other activities in furtherance of the conduct of the affairs of the Boyle Crew.

COUNT ONE
(Racketeering)

4. The allegations in paragraphs 1 through 3 are hereby realleged and incorporated as if fully set forth in this paragraph.

5. In or about and between November 1993 and August 28, 2003, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, being persons employed by and associated with the Boyle Crew, an enterprise which engaged in, and the activities of which affected, interstate commerce, knowingly and intentionally conducted and participated, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as defined in Title 18, United States Code, Sections 1961(1) and 1961(5), consisting of the racketeering acts set forth below.

RACKETEERING ACT ONE
(Robbery Conspiracy/Robbery)

6. The defendant named below committed the following acts, either one of which alone constitutes the commission of racketeering act one:

A. Robbery Conspiracy

7. On or about and between November 1, 1993 and February 3, 1994, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, together with others, knowingly

and intentionally conspired to forcibly steal property from employees of National Westminster Bank, 6901 Fifth Avenue, Brooklyn, New York, while aided by another person actually present, in violation of New York Penal Law Sections 105.10 and 160.10(1).

B. Robbery

8. On or about February 3, 1994, within the Eastern District of New York, the defendant EDMUND BOYLE, together with others, knowingly and intentionally forcibly stole property from employees of National Westminster Bank, 6901 Fifth Avenue, Brooklyn, New York, while aided by another person actually present, in violation of New York Penal Law Sections 160.10(1) and 20.00.

RACKETEERING ACT TWO

(Interstate Transportation of Stolen Money)

9. On or about December 21, 1998, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, together with others, knowingly and intentionally transported, transmitted and transferred in interstate commerce securities and money, of a value of $5,000 or more, knowing the same to have been stolen, to wit: cash and monetary instruments stolen from the night deposit box of Guaranty Bank, 7901 West

Brown Deer Road, Milwaukee, Wisconsin, in violation of Title 18, United States Code, Sections 2314 and 2.

RACKETEERING ACT THREE
(Interstate Transportation of Stolen Money)

10. On or about January 9, 1999, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, together with others, knowingly and intentionally transported, transmitted and transferred in interstate commerce securities and money, of a value of $5,000 or more, knowing the same to have been stolen, to wit: cash and monetary instruments stolen from the night deposit box of Summit Bank, 591 North Union Avenue, Hillside, New Jersey, in violation of Title 18, United States Code, Sections 2314 and 2.

RACKETEERING ACT FOUR
(Interstate Transportation of Stolen Money)

11. On or about January 12, 1999, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, together with others, knowingly and intentionally transported, transmitted and transferred in interstate commerce securities and money, of a value of $5,000 or more, knowing the same to have been stolen, to wit: cash and monetary instruments stolen from the night deposit box of M & T Bank, Oakdale Mall, Johnson City, New York, and transported through the State of New

Jersey, in violation of Title 18, United States Code, Sections 2314 and 2.

(Title 18, United States Code, Sections 1962(c), 1963 and 3551 et seq.)

COUNT TWO
(Racketeering Conspiracy)

12. The allegations in paragraphs 1 through 3 are hereby realleged and incorporated as if fully set forth in this paragraph.

13. In or about and between November 1993 and August 28, 2003, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, being persons employed by and associated with the Boyle Crew, an enterprise which engaged in, and the activities of which affected, interstate commerce, knowingly and intentionally conspired to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as defined in Title 18, United States Code, Sections 1961(1) and 1961(5).

14. The pattern of racketeering activity through which the

above-named defendant agreed to conduct the affairs of the enterprise consisted of acts set forth in paragraphs 6 through 11 of Count One, as Racketeering Acts 1 through 4, which are realleged and incorporated as if fully set forth in this paragraph. The defendant agreed that a conspirator would commit at least two of these acts of racketeering in the conduct of the affairs of the enterprise.

(Title 18, United States Code, Sections 1962(d), 1963 and 3551 et seq.).

COUNT THREE
(Bank Burglary Conspiracy)

15. In or about and between September 1998 and February 2002, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally conspired to enter banks, with intent to commit a larceny in such banks, to wit: the theft of cash and monetary instruments from the night deposit boxes, in violation of Title 18, United States Code, Sections 2113(a) and 2.

16. In furtherance of the conspiracy and to effect its

objectives, the above-named defendant and his coconspirators committed and caused to be committed, among others, the following:

OVERT ACTS

a. On or about October 12, 1998, the defendant EDMUND BOYLE, together with others, traveled to Commack, New York.

b. On or about October 24, 1998, the defendant EDMUND BOYLE, together with others, traveled to Fort Salonga, New York.

c. On or about October 31, 1998, the defendant EDMUND BOYLE, together with others, traveled to East Northport, New York.

d. On or about January 9, 1999, the defendant EDMUND BOYLE, together with others, traveled from the Eastern District of New York to Hillside, New Jersey.

e. On or about January 11, 1999, the defendant EDMUND BOYLE, together with others, traveled from the Eastern District of New York to Johnson City, New York.

(Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNT FOUR
(Attempted Bank Burglary: Shrewsbury State Bank, Ocean, New Jersey)

17. On or about September 28, 1998, within the District of New Jersey, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally attempted to enter a bank, to wit: Shrewsbury State Bank, 777 West Park Avenue, Ocean, New Jersey, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT FIVE
(Bank Burglary: Bank of Smithtown, Commack, New York)

18. On or about October 12, 1998, within the Eastern District of New York, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally entered a bank, to wit: Bank of Smithtown, 2020 Route 25, Commack, New York, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT SIX
(Attempted Bank Burglary: Bank of
New York, Syosset, New York)

19. On or about October 12, 1998, within the Eastern District of New York, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally attempted to enter a bank, to wit: Bank of New York, 550 Jerico Turnpike, Syosset, New York, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT SEVEN
(Attempted Bank Burglary:
Chase Manhattan Bank, Fort Salonga, New York)

20. On or about October 24, 1998, within the Eastern District of New York, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally attempted to enter a bank, to wit: Chase Manhattan Bank, 2 Fort Salonga Road, Fort Salonga, New York, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT EIGHT
(Attempted Bank Burglary: First National Bank of Long Island, Northport, New York)

21. On or about October 24, 1998, within the Eastern District of New York, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally attempted to enter a bank, to wit: First National Bank of Long Island, 711 Fort Salonga Road, Northport, New York, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT NINE
(Bank Burglary: Fleet Bank, East Northport, New York)

22. On or about October 31, 1998, within the Eastern District of New York, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally entered a bank, to wit: Fleet Bank, 680 Route 25A, East Northport, New York, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from

a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT TEN

(Bank Burglary: Guaranty Bank, Milwaukee, Wisconsin)

23. On or about December 20, 1998, within the Eastern District of Wisconsin, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally entered a bank, to wit: Guaranty Bank, 7901 West Brown Deer Road, Milwaukee, Wisconsin, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT ELEVEN

(Bank Burglary: Summit Bank, Hillside, New Jersey)

24. On or about January 9, 1999, within the District of New Jersey, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally entered a bank, to wit: Summit Bank, 591 North Union Avenue, Hillside, New Jersey, with intent to commit a

larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

COUNT TWELVE

(Bank Burglary: M & T Bank, Johnson City, New York)

25. On or about January 11, 1999, within the Northern District of New York, the defendant EDMUND BOYLE, also known as "Edward" and "Eddie," together with others, knowingly and intentionally entered a bank, to wit: M & T Bank, Oakdale Mall, Johnson City, New York, with intent to commit a larceny in such bank, to wit: the theft of cash and monetary instruments from a night deposit box.

(Title 18, United States Code, Sections 2113(a), 2 and 3551 et seq.)

CRIMINAL FORFEITURE ALLEGATIONS

A. Criminal Forfeiture Allegation for Counts One and Two

26. The United States hereby gives notice to the defendants charged in Counts One and Two that, upon conviction of either such offense, the government will seek forfeiture in accordance with Title 18, United States Code, Section 1963, which requires

any person convicted of such offenses to forfeit any property such defendants:

a. have acquired an interest in and maintained in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1);

b. have an interest in, security of, claims against, and property and contractual rights which afford a source of influence over the enterprise named and described herein that the defendants established, operated, controlled, conducted, and participated in the conduct of, in violation of Title 18, United States Code, Section 1962, which interests, securities, claims, and rights are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2); and

c. derived from proceeds obtained, directly and indirectly, from racketeering activity, in violation of Title 18, United States Code, Section 1962, which property is subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(3).

27. The interests of the defendant subject to forfeiture to the

United States pursuant to Title 18, United States Code, Section 1963(a)(1), (a)(2), and (a)(3), include, but are not limited to: the sum of at least One Million Nine Hundred and Seventy Thousand One Hundred and Fifty-One Dollars ($1,970,151).

28. The defendant named in Counts One and Two is jointly and severally liable for the forfeiture obligations as alleged above.

29. If any of the above-described forfeitable property, as a result of any act or omission of the defendant --

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third party;

c. Has been placed beyond the jurisdiction of the Court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 1963(m), to seek forfeiture of any other property of such defendant up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 1963)

B. Criminal Forfeiture Allegation for Counts Three Through Twelve

30. The United States hereby gives notice to the defendant charged in Counts Three through Twelve that, upon conviction of any such offenses, the government will seek forfeiture in accordance with Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), which require any person convicted of such offenses to forfeit any property constituting or derived from proceeds traceable to such offenses.

31. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third party;

c. Has been placed beyond the jurisdiction of the Court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be divided without difficulty, it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of such defendant up to the value of the forfeitable property described in this forfeiture allegation.

(Title 18, United States Code, Section 981(a)(1)(C); Title 21, United States Code, Section 853; Title 28, United States Code, Section 2461(c))

A TRUE BILL

FOREPERSON

ROSLYNN R. MAUSKOPF
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

[1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X
UNITED STATES OF AMERICA, : 03-CR-0970

-against- : U.S. Courthouse
Brooklyn, New York

EDMUND BOYLE, :

Defendant. : **TRANSCRIPT OF TRIAL**
March 7, 2005
---X 2:00 p.m.

BEFORE:
HONORABLE STERLING JOHNSON, JR
United States District Judge
and a jury

APPEARANCES:

For the Government: ROSLYN R. MAUSKOPF, ESQUIRE
United States Attorney
One Pierrepont Plaza
Brooklyn, New York 11201

By: JOSEPH LIPTON, ESQUIRE
THOMAS SIEGEL, ESQUIRE
Assistant U.S. Attorneys

For the Defendant: MARTIN GEDULDIG, ESQUIRE
400 So. Oyster Bay Road
Suite 304
Hicksville, New York 11801
and
JOHN JC MERINGDO, ESQUIRE
MARC FERNICH, ESQUIRE

RONALD E. TOLKIN, RMR
OFFICIAL COURT REPORTER

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[42]

Direct Examination of Ludwigsen

Q Do you have an understanding of the difference between robbery and burglary?

A Yes, I could.

Q What is your understanding of the difference?

A A burglary is when you really don't have to confront anyone, when it's done, when the place is closed. A robbery is when you have to confront people.

Q With regard to the bank burglaries that you committed between 1991 and 1994, what part of the bank building did you target?

A The after-hours night deposit drop.

Q Can you explain to the jury what is a night deposit drop?

A Where business establishments leave their receipts of deposits for the night when the bank is closed.

Q Was there a particular time of the day when you would do these burglaries?

A Yes, nighttime.

Q For what reason would you do these bank burglaries at night?

A Because the money was in the box at the time.

Q Did you do these burglaries of night deposit boxes alone or with others?

A With others.

Q What were the roles that the participants in the one of your night deposit box burglaries would play?

A Some people would be lookouts, some people would actually do the work and take the box off the wall.

Q Can you explain to the jury what is a lookout?

A Someone that is placed around the vicinity of the bank so that in case the cops or somebody will come in, they will alert us.

Q What type of equipment if any --

THE COURT: How would they alert you?

THE WITNESS: With walkie-talkies.

Q What type of equipment would you take on these bank burglaries?

A Walkie-talkies, police scanners, flashlights, tools to take the box off the wall.

Q Approximately how many attempted bank burglaries during the period 1991 through 1994 were you involved in?

A Approximately 30, give or take a little.

Q Where you and the others you were involved with in burglarizing banks also involved in scouting potential target banks?

A Yes.

Q Tell us about that, what would you do?

A We would just take long drives, drive around. If we saw the type of box we knew how to take off the wall, we would come back after the weekend and attempt to rob them.

Q In what states did you do that?

A In the same ones I previously mentioned.

Q In the period 1991 through '94, were the participants in the bank burglaries that you committed and attempted to commit the exact same individuals each time?

A Mostly the same but sometimes we would bring other people with us.

Q Were there certain individuals who participated in the majority of the burglaries of night deposit boxes and attempted burglaries during the period 1991 through '94?

A Yes, myself.

Q Who were the individuals who were in the majority of those activities?

A I would say Fat Sal, Beck, Gerard and Willie Galloway.

[46]

Direct Examination of Ludwigsen

Q I'd like to ask you now what was the first bank that you were ever involved in burglarizing?

A It was in Brooklyn, it was in Caesar's Bay Bizarre parking lot.

Q Do you know what part of Brooklyn that is?

A I think it's Bensonhurst. I'm not sure.

THE COURT: Is that right off the Belt Parkway?

THE WITNESS: Yes, it is.

Q Who else participated in that burglary?

A It was myself, Fat Sal, Beck, Gerard and Tommy Dono.

Q When that was burglary, approximately?

A The fall of 1991.

Q How was the bank selected?

A Fat Sal selected it.

[47]

Direct Examination of Ludwigsen

Q What, if any, steps did you and your associates take leading up to the burglary of that bank?

A Fat Sal explained to us how to take it off the wall and then we put our lookouts in certain areas and the rest of us took the box off the wall.

Q Was that burglary of the bank at Caesar's Bay successful?

A Yes, it was.

Q How much money was obtained?

A Approximately $30,000.

Q Explain to the jury how would you get the money out of the box?

A Fat Sal had like a gardening tool that had a sharp spear at the end and we would actually spear the money out of the box because it was deep into the back of it.

Q After that first bank burglary at Caesar's Bay, what was the next bank burglary that you were involved in?

A A couple of weeks later on 75th Street and 13th Avenue in Brooklyn. I believe that is Bay Ridge.

Q Who was involved in that bank burglary?

A The same people as the first one.

Q Who was that, do you know?

A Tommy Dono, Beck, myself, Fat Sal and Gerard.

Q Was that bank burglary also successful?

A Yes, it was.

Q How much money was taken on that occasion?

A Approximately the same, 30,000 or so.

Q In each of those two bank burglaries, were lookouts involved?

A Excuse me?

Q Did you use lookouts in those two bank burglaries?

A Yes.

Q How about walkie-talkies?

A Yes.

Q Were the other successful bank burglaries of night deposit boxes that you were involved in 1991 to '94 a similar format or different?

A Similar.

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[53]

Direct Examination of Ludwigsen

Q I would like to focus your attention on the period of time leading up to this robbery.

First, can you tell us approximately when this robbery occurred?

A I believe it was December of 1994 -- I mean February, February of '94.

Q How did the possibility of committing this particular robbery first come up to you?

[54]

Direct Examination of Ludwigsen

A Beck approached me and told me that one of his cousins was working in the bank as an electrician and he seen a lady counting a large amount of money.

Q With whom did you first discuss this tip that you received from Beck's relative?

A First, it was just me and Beck.

Q What did you and he decide to do with that information?

A We brought it to Fat Sal.

Q Tell us about the discussion that you and Fat Sal had about this tip?

A We were told that he, Beck's cousin, was speaking to the lady and she said that she counts this money every Thursday, it was approximately a million dollars in the bank, so we told Sal about that

Q And what happened when you presented that to Sal, what happened as a result of that?

A We drove down to Brooklyn to take a look at the bank and to observe, see if there was, which plan we could come up with to try to rob it.

Q Did there come a point when a fourth person joined into the robbery plot?

A Yes, there was.

Q How did that come about?

A Fat Sal introduced him to us.

[55]

Direct Examination of Ludwigsen

Q In those days, would you commit crimes with just anybody?

A No, I wouldn't.

Q Would there be a problem with that?

A Yes, there would.

Q What would the problem be?

A We would have to know that the guy was capable of committing this crime, if we could trust him, so on.

Q Who did Fat Sal propose to join the group of you, Fat Sal and Beck to commit this robbery?

A His friend Eddie.

Q What, if anything, did Fat Sal say to you about including his friend Eddie in this scheme?

A That he was a good friend of his and he committed other crimes with him.

Q What was your response to Fat Sal's proposal that Eddie join the group?

A I was fine with it because I trusted Sal.

Q What was Beck's response?

A He was fine with it also.

Q When did you first meet Eddie?

A Approximately a week before the robbery.

Q Where did you first meet Eddie?

A Right up the block from the bank itself.

Q What was the purpose of that particular meeting about a week before the robbery?

A To go over the plan and to come up with a way to rob the bank.

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[104]

Cross Examination of Ludwigsen

Q Can you physically tell us how tall Eddie Boyle is?

A I would being guessing, I'm not sure.

Q Because it is only one time that you ever saw him?

A Two times.

Q Two times. You haven't seen him according to you since '94?

A Right.

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[154]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,	:	03-CR-0970 (SJ)
-against-	:	U.S. Courthouse Brooklyn, New York
EDMUND BOYLE,	:	
Defendant.	:	**TRANSCRIPT OF TRIAL** March 8, 2005 Ten o'clock a.m.

---X

BEFORE:

HONORABLE STERLING JOHNSON, JR., U.S.D.J.,
And a jury

APPEARANCES:

For the Government:	ROSLYN R. MAUSKOPF, ESQUIRE United States Attorney One Pierrepont Plaza Brooklyn, New York 11201
	By: THOMAS SIEGEL JOSEPH LIPTON Assistant U.S. Attorneys
For the Defendant:	MARTIN GEDULDIG, ESQ. JOHN JC MERINGDO, ESQ.
Court Reporter:	Holly Driscoll, CSR Official Court Reporter 225 Cadman Plaza East Brooklyn, New York 11201 (718) 260-2469

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Cross Examination of Ludwigsen

Q And Fat Sal had a group of people around him that would help him to commit these crimes?

A Yes.

Q Beck was like a first lieutenant for Fat Sal, is that fair to say?

A We all did crimes at different times with different – with each other in different places. Nobody had any type of standing where he was the boss, you know, none of that.

Q So, there was no organization at all?

A No.

Q You guys were just free floaters?

A Yes.

Q Each individual crime withstood by itself?

A Yes.

Q And there wasn't an ongoing informal plan that you had with a group of people to commit crimes so that the group could profit?

A No, we did crimes together but it was not that I know of as a group.

***

[193]

Cross Examination of Ludwigsen

Q An I think you said that you also did a number of bank burglaries with Mangiavillano; is that right?

A Yes.

Q Approximately ten or so?

A Maybe more.

Q And those were done on an individual basis when you got together to rob it or burglarize it, you would burglarize the bank, right?

A Yes.

Q It wasn't part of any crew or group?

A No, sometimes it was the same people, other times, no.

Q So, there was no leadership chart that could be drawn, right?

[194]

Cross Examination of Ludwigsen

A No.

Q And there was no informal understanding among the group, it was just who was available to do the job when it came up?

A Yes.

Q And that was, to your knowledge, the way it operated the whole time you were out on the street?

A Basically.

***

[198]

Cross Examination of Ludwigsen

Q So there were four guys that knew each other for many, many years and all of you had committed crimes, right?

A Early on in time, yes.

Q What do you mean early on?

A I didn't commit a crime were Gerard passed, you know, maybe 1993.

Q I am saying all of you committed crimes?

A At one time.

Q I am not saying together. All of you committed many crimes, individually, perhaps some together.

[199]

Cross Examination of Ludwigsen

A Yes.

Q But certainly individually you guys were responsible for probably hundreds of crimes, is that fair to say?

A Yes.

Q Might even -- if you think of all of the cars that were stolen, it could be a thousand or more crimes?

A I don't know.

Q That wouldn't be beyond the realm of possibility, am I right?

A It would be stretching it a little bit, I believe.

Q A little bit? So what, 800?

A I don't know.

Q In all of these crimes during all of these years you met Eddie Boyle once, is that right?

A Twice.

Q Twice. But one crime, right?

A Yes.

***

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X
UNITED STATES OF AMERICA, : 03-CR-0970 (SJ)

-against- : U.S. Courthouse
Brooklyn, New York

EDMUND BOYLE, :

Defendant. : **TRANSCRIPT OF TRIAL**
March 9, 2005
---X 9:30 a.m.

BEFORE:
HONORABLE STERLING JOHNSON, JR., U.S.D.J.,
And a jury

APPEARANCES:

For the Government: ROSLYN R. MAUSKOPF, ESQUIRE
United States Attorney
One Pierrepont Plaza
Brooklyn, New York 11201

By: THOMAS SIEGEL
JOEY LIPTON
Assistant U.S. Attorneys

For the Defendant: MARTIN GEDULDIG, ESQ.
JOHN JC MERINGDO, ESQ.

Court Reporter: Holly Driscoll, CSR
Official Court Reporter
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 260-2469

***

[282]

Direct Examination of Bellafiore

Q How do you know the defendant Eddie Boyle?

A Through Fat Sal Mangiavillano and Thomas Dono.

Q What were some of the bank burglaries you committed with Eddie Boyle?

A We did some in New York, upstate New York, Long Island, New Jersey, and Wisconsin, Milwaukee.

Q Generally when did those occur?

A The end of - - toward the end of '98 to '99.

***

[298]

Direct Examination of Bellafiore

Q All right. When did you start committing bank burglaries?

A '91.

Q Who did you start doing those with?

A Me, Fat Sal, Beck, Chris, Tommy Dono, William Galloway.

Q How did you learn how to do that?

A Fat Sal.

Q What was the first burglary of a night deposit box that you did?

A Caesar's Bay, the one with the robbery, Caesar's Bay.

Q So, the same bank you did the robbery at?

A Yeah, earlier.

Q Who participated in that burglary?

A Me, Fat Sal, Beck, Tommy Dono and Chris.

Q Chris is Chris Ludwigsen?

A Yes.

[300]

Direct Examination of Bellafiore

Q After doing that bank did you start burglarizing night deposit boxes more regularly?

A Yes.

Q Now, did you get arrested early on for burglarizing banks?

A Yes, in 1991.

Q At that time how many banks would you say you had burglarized?

A We did a couple, more than a couple, maybe about 25, 30.

***

[302]

Direct Examination of Bellafiore

Q When did you go back to jail?

A '97.

Q How long did you go back to jail for?

A Eighteen months.

Q Now. Before you went back to prison about how many banks did you burglarize between the first time in prison and the second time?

A Say that again.

Q Before you went back to prison on the violation how many banks had you burglarized up to that point?

A About 40; 30, 40.

Q Who were the main people that you committed those bank burglaries with?

A Me, Fat Sal, Beck William Galloway, Mike Mazzara, Vinny Kuminski, Joe Angelo, Tommy Dono, John Micali, John Matera and others.

***

[304]

Direct Examination of Bellafiore

Q Did you go on to commit more crimes with Beck – excuse me, sorry, Micali and Kupa?

A Yes.

Q In general with these banks, what types of locations would you look for to burglarize night deposit boxes?

A Like malls, strip malls where there would be a high volume of stores.

Q More specifically, why would you try those banks?

A Because that's where the most money would be, you know, if you go to a mall, that's where everybody goes to shop; strip malls, same thing, there would be a lot of money, more money than an average regular bank that would be on the corner of, you know, any street.

Q Okay. Did you look for certain types of night deposit boxes to burglarize?

A Yes.

Q Which ones?

A They were called D-Bolts, Mosler.

THE COURT: The safe?

THE WITNESS: Yeah, same company.

Q Those are manufacturers of these boxes?

A Yes.

[305]

Direct Examination of Bellafiore

Q Now, did you burglarize banks in New York City?

A Yes.

Q Where in New York City?

A I mean all five boroughs and Long Island, upstate New York.

Q How about outside New York State?

A New Jersey.

Q Anywhere else?

A Wisconsin, Vegas, Florida.

***

[307]

Direct Examination of Bellafiore

Q When did you get out of the halfway house?

A I got out December 12th, 1998.

Q So, you were in the halfway house about four months?

A Four months.

Q While you were in the halfway house did you commit bank burglaries?

A Yes.

Q And that was in violation of the rules obviously?

A Yes.

Q Who did you burglarize those banks with?

A It was me, Tommy Dono, Ronnie Petrino, Eddie Boyle, John Micali and Woody at that time.

Q When you say "Woody", do you know that person's name?

A I don't know his real name, I just know him as Woody.

Q How did you know Eddie Boyle?

A I met him through Tommy Dono and Fat Sal; well, more through Tommy Dono than Fat Sal but I knew of him through Fat Sal.

Q Where did you actually meet him, do you recall?

A I would say by Tommy Dono's club, around there.

Q Where was Tommy Dono's club?

A 13th Avenue and 73rd Street.

Q When you say "club", what do you mean?

A It was like a little social club I guess you'd call it, it was just a club to hang out in.

Q Did other people you did bank burglaries and robberies with hang out there?

A Yeah.

Q What year did you meet Eddie Boyle there?

A '97.

Q Up to that point had you done any criminal activity with him?

[309]

Direct Examination of Bellafiore

A No.

Q Now, did Boyle become part of the group that you burglarized banks with?

A Yes.

Q Now, did you call yourself the Boyle Crew?

A No.

Q Did you have any name for your group?

A No.

Q Even though you didn't have a name did you burglarize banks together?

A Yes.

Q What was the purpose?

A To get money.

***

[312]

Direct Examination of Bellafiore

Q Was there anything in the van when you went to do the bank burglaries on that Monday?

[313]

Direct Examination of Bellafiore

A Yeah, the tools to commit these burglaries.

Q What type of tools?

A Screw drivers, ratchet set, light little hammers, five pound hammers and crowbar, fishing gaff.

Q Did he keep those tools in the van?

A They were in the van at the time, yeah.

Q Did he keep them anywhere else that you knew of?

A In the garage or in the house, yeah.

Q Where was that?

A 13th Avenue or 12th Avenue and 85th Street, that's where he lived at the time.

***

[316]

Direct Examination of Bellafiore

Q What did everybody do when you got to that bank and you drove up to the box?

A Well, we actually had to set up for it. All we did was just monitor what was coming up and down Jericho Turnpike which would be east to west of the bank.

[317]

Direct Examination of Bellafiore

Q Who did what?

A Tommy Dono was the lookout east of the bank and Ronnie and John Micali were west of the bank on Jericho Turnpike.

Q Did they have any communication devices?

A Yes, walkie-talkie.

Q Was that common on your burglaries to have walkie-talkies?

A Most of the time.

Q What were they used for?

A Just to let us know any cops were coming by or any cars in general.

Q Who went to the box itself?

A Myself and Eddie Boyle.

Q What did you do when you got there?

A I took off the metal where you could see in the picture, took off the tin metal, took out the four screws in the bottom and then pried the drawer off.

***

[320]

Direct Examination of Bellafiore

Q Did you use that crowbar on bank burglaries?

A I used it, yes.

Q Did you use it on this particular bank?

A No.

Q Is that like the one you used on this particular bank?

A Similar.

Q What did you do once you got the box off the wall?

A I had to get the fishing gaff to take the money out of the box.

Q What is a fishing gaff?

A It is a hook, you know, used to pull out, like you go fishing, to get a bigger fish you have to get out of the water, you use that hook, you get it close to the boat and use the hook and pull it out.

Q I'm going to show you what's been marked for identification as Government Exhibit 25-C and ask you if you recognize what that is?

A Yes, a fishing gaff.

Q Is this one of the fishing gaffs you used to commit your bank burglaries?

A Yes.

***

[323]

Direct Examination of Bellafiore

Q How did you end up splitting the money with the people you did the burglary with?

A If there was five people, we'd go five ways and then we'd take a 20 percent off the top, whoever was up at the box would get 20 percent.

Q So, whoever physically removed the box got extra?

A Yes.

Q Why is that?

A We would take more of the risk.

***

[336]

Direct Examination of Bellafiore

VOIR DIRE EXAMINATION

By Mr. GEDULDIG:

Q Those items had nothing to do with the burglary of the Bank of New York, is that right?

A No.

Q They were just used entirely for burglaries that you committed in Florida?

A Yes.

Q With other people?

A Yeah.

Q Not this defendant here, Edmund Boyle, right?

A No, not these, no.

MR. GEDULDIG: I object.

THE COURT: Received.

DIRECT EXAMINATION (Cont'd.)

By: Mr. LIPTON:

Q Now, those, it is two walkie-talkies; explain what they are, again, sorry?

A Two walkie-talkies and this is a police scanner. This if

A you know the program codes which you can buy in Radio Shack, you can program fire codes, ambulance, anything, you can program people's phones off this, it is 800 megahertz.

THE COURT: Tell the jury what the scanner does.

THE WITNESS: So, this, when you program anybody's code, if the code is -- like I know pretty much some of the codes, like 426.587 would be like a precinct, say the 100th Precinct would be in Manhattan, you program that in here, you'll hear everything that is going to go through Manhattan, well, in that precinct area and if that bank was on First Street down here downtown or in Manhattan, it would be, you know, it would come up in code which we knew would be like, you know, 513, we'll just use this for an example, 513 at 1:00 in the morning is us burglarizing the box and it is time to leave because the cops are coming.

Q And the yellow things, just hold those up and explain what those are?

A These are the walkie-talkies, I mean these ones here are not the ones we used, these are actually cheaper ones, I had these in Florida. We had better ones than this here.

THE COURT: These you used – you said you used them in Florida?'

THE WITNESS: Yes. These are just basically the same thing, just in between if somebody was coming, it would be the same thing, you'd have a lookout, they'd be on the

corner just to – say if I was the lookout, which most of the time I wasn't, if I was a lookout, I would say the cops are coming down the block, you got to leave. You walk away from the box, if you're a fair distance away from the box you'd be okay.

THE COURT: What is the range of those walkie-talkies?

THE WITNESS: Not too good, they're cheap, maybe a block or two blocks.

***

[410]

Direct Examination of Bellafiore

Q Would the people that you did banks with always tell you about banks that you went on?

THE COURT: Now, just a second. You say you were aware, how were you aware?

THE WITNESS: By my other friends, people, you know, we always talk about stuff, I mean, in-between the friends.

THE COURT: Who are these friends?

THE WITNESS: Fat Sal, Beck, Chris Paciello. I mean, all of the people named in the indictment basically.

***

[496]

Cross Examination of Bellafiore

Q Okay. Are any of the names on the list on your indictment on that board?

A Any of the names?

Q Yeah?

A Yes.

Q Which names in your indictment appear on that board?

A Ned Bilali.

Q Let's go one at a time. Ned the Head Bilali?

A That's him.

Q Lets take him off. Okay. Who else?

A Fabrizio DeFrancisci.

Q Okay. Who else?

A Thomas Dono.

Q Who else?

A Michael Mazzara

Q Who?

A Michael Mazzara.

Q Who else?

A Joseph Light

[497]

Cross Examination of Bellafiore

Q He's not on the board?

A No. George Ludwigsen

Q He had his own indict[illegible] didn't he?

A That's Chris Ludwigsen.

Q I'm sorry, you're right. George is not on the board?

A No, he's not.

Q But Chris is?

A Yes

Q And to you knowledge, did Chris have his own indictment?

A Yes.

Q Okay, and he had his own crew?

A Yes.

Q Did you know what his crew was called?

A No.

Q Okay.

A You're ready? Sal – Blas – I don't know, I can't read that but Salvatore Mangiavillano.

Q That's Fat Sal, right?

A Yes.

Q He has his own indictment as well, didn't he?

A No.

Q did he have a crew?

A No.

Q Did you ever hear of a crew called the Springville Boys – the New Springville Boys?

[498]

Cross Examination of Bellafiore

A No.

***

[500]

Cross Examination of Bellafiore

Now, to your knowledge, was Chris Ludwigsen indicted on his own indictment with his own crew of criminal partners?

A I never read the indictment but I know he was indicted, yes.

Q And he was an organizer, wouldn't you say?

A I don't know if he was an organizer. I wouldn't say he was an organizer because I really, like I said, I've never read his paperwork but I wouldn't consider him an organizer, no.

Q Would you consider yourself an organizer?

A I put a lot of stuff together, yes.

Q You're in that indictment also, we should take your picture off the board.

A I wasn't on that indictment.

Q Not – that one in front of you?

A Oh, this one, yes. Okay.

Q All right. Would you consider yourself an organizer?

A Sometimes, not all the time but sometimes.

Q Sometimes. And it would be for different people at different times?

A Yeah.

Q I wouldn't be for any set group?

A No.

Q It wasn't like you could call up a chief lieutenant and say get me two guys from the crew and we're going to go out and commit a crime?

MR. LIPTON: Objection to form, Your honor.

THE COURT: I'm going to allow it.

A Would it be – could you say that again, that question.

Q I said it wasn't as if you could call up your chief lieutenant and say get me two guys from the crew, we're going to do a bank tonight?

A No, it would actually be guess what happened, my friend just found something, you want to go check it out, okay, let do that and then we're just using this hypothetically.

Q Right.

A I would say, all right, I am going to call Eddie because you know what, Eddie got the van, he's a go, let's go see what he's got. Then we go down to Brooklyn and we meet up at this social club which is just a social club, it is not - I'm not saying it is for any type of anything, just where we go, now we pick up John Matera; John, do you want to go check this out and then we start from there.

Q And if Eddie says I got a date tonight?

A Bye-bye, Eddie.

Q Right?

A Next guy comes up.

Q If you don't have enough guys and Matera was willing to come along, you'd say to Matera see if you can get somebody, right?

A Maybe, not all the time.

Q But there were guys that could reach out and get other people?

A Guys from our click, yes.

Q And these were guys that just – it was certainly an informal kind of an arrangement that you had, right you didn't have any meetings, did you?

A On any bank that we were going to do, yes, we did.

Q You plotted out the burglary?

A Yeah, that type of stuff, yes.

Q The group didn't meet every Tuesday night?

A And let's talk about banks, no.

Q And so, it was just something always done in a spur of the moment kind of thing?

A I wouldn't say spur of the moment.

Q Well, if you found a bank that you liked, you would then start making calls, right?

A Yeah.

Q So, in that respect it was spur of the moment, right?

A Well, making calls and spur of the moment, starting on a Monday and ending on a Sunday, that's a whole week of advance.

Q Trying to reach out to people, trying to find who was available to do that?

A Yes, who was coming, yes.

Q You don't know who's available?

A No, until, of course, game time.

Q Do people call you – did any one of these guys call you to see if you had something going on?

A Yeah.

Q Who would call you?

A Just shoot a name to you, William Galloway, he would call me.

Q All right. So, William Galloway would be a guy that called you?

A Yeah.

Q So, he's on our – Willy Galloway is Apple Head; so, he's not in the indictment but he was a guy you dealt with, right?

A Yes.

Q Who else on that board would you call or would call you?

A Just go around the board, everybody would call each other, that's just the way how it worked. I mean Lulzim Kupa is not on that board and he brought us to M & T.

***

[505]

Cross Examination of Bellafiore

Q The reference to the Bank Crew in your indictment, that's not a phrase you ever heard, is it?

A No.

Q That's a phrase or a name that was made up by the government?

A I don't know. I mean even as I - - when I was a defendant

[506]

Cross Examination of Bellafiore

Q no one ever really said it's a Bank Crew, the Bank Crew, they never said that.

***

[529]

Cross Examination of Bellafiore

Q Did you get a bigger piece of the cut because you were the leader of the group?

A No. I was the one on the box who had the most of the risk.

Q So it had nothing to do with any kind of an organization within the group, it just had to do with the person who took the biggest risk?

A Yeah.

Q So there was no formal understanding that you were a leader or anybody else was leader and that they deserved to get more money, is that right?

A Yeah, that is fair to say.

***

[541]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--X

UNITED STATES OF AMERICA, : 03-CR-0970 (SJ)

-against- : U.S. Courthouse
Brooklyn, New York

EDMUND BOYLE, :

Defendant. : **TRANSCRIPT OF TRIAL**
March 10, 2005

--X 9:30 a.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR TRIAL BEFORE HONORABLE STERLING JOHNSON, JR., UNITED STATES DISTRICT JUDGE, and a Jury.

APPEARANCES:

For the Plaintiff:	ROSLYN R. MAUSKOPF, ESQUIRE United States Attorney One Pierrepont Plaza Brooklyn, New York 11201 By: THOMAS SIEGEL, AUSA JOEY LIPTON, AUSA
For the Defendant:	MARTIN GEDULDIG, ESQ. JOHN JC MERINGDO, ESQ.
Official Court Reporter:	Diana Pereira, RPR-CSR-CRR Official Court Reporter
E-mail: ForDiana@aol	(718) 260-2600 x 2507225

***

[649]

Re-Cross Examination of Bellafiore

Q Now, you've done bank burglaries, with Sal Mangiavillano?

A Yes.

Q Have you ever done bank burglaries, with you, where there was you, Mangiavillano and Eddie Boyle?

A No.

***

[676]

Re-Cross Examination of Bellafiore

Q Did somebody come to you and ask you to give money - -

A Yes.

Q - - to give money to Eddie Boyle lawyer for his defense?

A yes.

Q Did you give any money?

A No.

Q There was no obligation for you to give any money, right?

A No.

***

[678]

Re-Cross Examination of Bellafiore

Q Would you be under obligation to tell Micali that you had done a burglary with these other guys?

MR. LIPTON: Objection to form. Hypothetical questions.

THE COURT: No. You can answer the question.

A I believe so. I would link it as John and Tommy are friends and I would probably would tell them.

Q You would do it because they were friends?

A Yeah.

Q Not because of any understanding this group had?

A No.

Q The group didn't impose any kind of requirements on you to do anything. Right?

A Only to commit the - - when the burglary was taking place, put it together, that's it. Other than that, no.

Q That's right. So each individual burglary or robbery stood by itself - -

A Within these organization of guys, yes.

Q - - that did the burglary or the robbery?

A Yes.

[679]

Re-Cross Examination of Bellafiore

Q There was no group or association here, right?

A No. There was.

Q And you had meetings?

A Of course, before we did a job, yes, we did.

Q Just had a meeting with the people who were going to do the job?

A Yes.

Q That was it? Nobody else took part in that meeting?

A If they weren't there, they weren't.

Q You didn't call up and say, *we are going to have a meeting about a job we might do*?

A Could be hard for me to do if they are in MCC or Oklahoma.

Q Not everybody was in the MCC or Oklahoma, right?

THE COURT: Sustained.

***

[735]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--X
UNITED STATES OF AMERICA, : 03-CR-0970 (SJ)

-against- : U.S. Courthouse
Brooklyn, New York

EDMUND BOYLE, :

Defendant. : **TRANSCRIPT OF TRIAL**
March 14, 2005
--X 9:30 a.m.

TRANSCRIPT OF CRIMINAL TRIAL
BEFORE THE HONORABLE STERLING JOHNSON, JR.,
UNITED STATES SENIOR DISTRICT JUDGE, and a jury

APPEARANCES:

For the Plaintiff:	ROSLYN R. MAUSKOPF, ESQUIRE United States Attorney By: THOMAS SIEGEL, ESQ. JOEY LIPTON, ESQ. Assistant United States Attorneys
For the Defendant:	MARTIN GEDULDIG, ESQ. JOHN JC MERINGDO, ESQ.
Court Reporter:	FREDERICK P. GUERINO, C.S.R. 225 Cadman Plaza East Brooklyn, New York (718) 330-7687

***

Q Over time, did you start to develop a relationship with Eddie Boyle?

A Yes, I did.

Q Did your relationship with Eddie Boyle progress from just stealing cars?

A Yes.

Q What other crimes did you commit with him?

A Bank burglaries and the robbery I described before.

Q Did Eddie Boyle become part of the group with bank robberies?

A Yes, he did.

Q Did you call the group the Boyle group?

A No, we did not.

Q Did have a name for the group?

A No, we did not.

Q Even though you had didn't have a name, did you commit bank crimes?

A Yes.

Q What was the purpose?

A To make money.

***

[780]

Direct Examination of Mangiavillano

Q What happened when you got to the bank?

A We attached the drill to the wall.

Q And just describe how you went about attaching the drill to the wall?

A Joey D'Angelo ran a power wire from about hundred feet away. There was a little cap on the sidewalk that was electric for one of the signs. Joey D'Angelo ran an

[781]

Direct Examination of Mangiavillano

extension cord cable to run it through there. I drilled a hole through the wall to set the anchor and drill the hole in the wall. We bolted it and covered it up with a refrigerator box or a washing machine box and had a remote control for the drill and were able to operate the drill by remote control.

Q What was Eddie Boyle doing while you were setting it up?

A He was a lookout at the time on the street.

Q Was he on foot or in a car?

A He was outside his sister's black Monte Carlo.

***

[815]

Direct Examination of Mangiavillano

Q In the beginning of the '90's, '90, '91, who did you start doing night deposit box burglaries with?

A Tommy Dono, Gerald Bellafiore, Beck Fiseku, Chris Ludwigsen.

Q How did they learn to do bank burglaries?

A They learned from me.

[816]

Direct Examination of Mangiavillano

Q After that, did you start burglarizing banks more regularly with those individuals?

A Yes, I did.

Q How long did you continue to burglarize banks for?

A I continued burglarizing banks until about May of 1996.

Q Okay.

How many banks during that time would you say you burglarized?

A In excess of thirty.

[817]

Direct Examination of Mangiavillano

Q Was there a main or a core group of people you did most of the banks with?

A Yes.

Q Who was that?

A Me, Beck, Gerald, Tommy Dono.

[818]

Direct Examination of Mangiavillano

Q Did you burglarize any other deposit boxes with Eddie besides that one?

[819]

Direct Examination of Mangiavillano

A No.

***

[929]

Cross Examination of Mangiavillano

Q Now, your job in setting up these burglaries and robberies was to assign to the different people, right?

A Not specifically.

Q That was generally what you did, wasn't it?

A Basically discuss things and we agreed upon it, that's what we did.

Q And you heard this phrase, and you told us that you heard this phrase, Fat Sal Production. That was in reference to burglaries or robberies that you put together, right?

A I believe so, sir.

Q And that was actually a term of compliment to you that you could do a job, that you could earn money, that your productions paid off, right?

A I believe so, sir.

Q So, it would be fair to say that your were the one that was more often than not in charge of one of these operations, a burglary or a robbery, right?

A Yes, you could say that.

Q And you would pretty much decide who would be a lookout or who might go into the bank or who might be on the box?

A You could say that.

[930]

Cross Examination of Mangiavillano

Q And you pled guilty to being a part of the group that was designated the New Springville Boys, right?

A I pled guilty to that conspiracy.

Q That was a RICO?

A A RICO conspiracy.

Q And you never heard that phrase the New Springville Boys; is that right?

A I heard it.

Q You didn't hear it before you were indicted, though?

A I heard some people refer to certain individuals as the New Springville Boys.

Q That wasn't a name that was made up by the government?

A New Springville Boys?

Q Yes?

A No. Frank Costanza, Lee D'Avanzo, Rob McIvor that we referred to as the New Springville Boys.

Q By whom?

A By the guys in Staten Island streets.

Q That was the group you admitted to being a part of?

A I pled guilty to conspiring with them.

***

[933]

Cross Examination of Mangiavillano

Q Have you ever heard of the name The Night Drop Crew?

A No.

Q Have you ever heard the name The Boyle Crew?

A No.

Q The Bank Crew?

A Yes.

Q And the New Springville Boys?

A Yes.

***

Supplemental Request to Charge on RICO Enterprise Element

To establish an association-in-fact enterprise, the government must convince you, beyond a reasonable doubt, that the alleged Boyle Crew had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts. If the government fails to meet this burden, you must acquit Mr. Boyle on the RICO counts.[1]

***

---

[1] *See, e.g., United States v. Turkette,* 452 U.S. 576, 583 (1981); *United States v. Porcelli,* 865 F.2d 1352, 1363 (2d Cir. 1989); *United States v. Coonan,* 938 F.2d 1553, 1560 (2d Cir. 1991); *United States v. Pimentel,* 346 F.3d 285, 288 (2d Cir. 2003); *United States v. Feliciano,* 223 F.3d 102, 109 (2d Cir. 2000); *United States v. Diaz,* 176 F.3d 52, 73-74 (2d Cir. 1999); *United States v. Korando,* 29 F.3 1114, 1117 (7th Cir. 1994); *United States v. Gray,* 137 F.3d 765, 772-73 (4th Cir. 1988); *United States v. Richardson,* 167 F.3d 621, 623, 625 (D.C. Cir. 1999); *United States v. Ganim,* 225 F. Supp. 2d 145, 161-62 (D. Conn.), *clarification denied,* 2002 WL 31780856 (D. Conn. Dec. 12, 2002); *RD Mgmt. Corp. v. Samuels,* No. 02 Civ. 4876 (SWK), 2003 WL 21254076, at *7 (S.D.N.Y. May 29, 2003).

[1026]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--X
UNITED STATES OF AMERICA, : 03-CR-0970 (SJ)

-against- : U.S. Courthouse
Brooklyn, New York

EDMUND BOYLE, :

Defendant. : **TRANSCRIPT OF TRIAL**
March 15, 2005
--X 9:30 a.m.

TRANSCRIPT OF CRIMINAL TRIAL
BEFORE THE HONORABLE STERLING JOHNSON, JR.,
UNITED STATES SENIOR DISTRICT JUDGE, and a jury

APPEARANCES:

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United States Attorney
By: THOMAS SIEGEL, ESQ.
JOEY LIPTON, ESQ.
Assistant United States Attorneys

For the Defendant: MARTIN GEDULDIG, ESQ.
JOHN JC MERINGDO, ESQ.

Court Reporter: FREDERICK P. GUERINO, C.S.R.
225 Cadman Plaza East
Brooklyn, New York
(718) 330-7687

***

Charge Conference

MR. FERNICH: Okay, your Honor.

Your Honor, we are moving now to page 64. This is where the supplemental request to charge that we submitted to you comes into play. I would like this supplemental request to charge to be integrated in the charge somehow, and I have some specific objections to the charge as written.

THE COURT: Have you seen this?

MR. SEIGEL: I just saw it now.

THE COURT: What are your comments on this?

MR. SEIGEL: it is completely wrong on the law. It is Eighth and Ninth Circuit law, Judge, not Second Circuit law.

MR. FERNICH: I cited to Second Circuit cases.

THE COURT: Porcelli.

MR. FERNICH: Porcelli and Coonan and Pimentel and Feliciano and Diaz, all Second Circuit cases, as well as two District Court cases out of the Second Circuit.

THE COURT: I will look at this and reserve on this.

MR. FERNICH: Okay, your Honor.

THE COURT: This is the standard enterprise charge given in this circuit.

MR. SEIGEL: I will speak to that when it is our turn.

THE COURT: You got to wait. Let him everything he has to do.

MR. FERNICH: I'm requesting this charge under the rubric of the theory of the defense charge. As I'm sure you heard throughout this case, it has been a theme emphasized, helped by the defense under cases of U.S. v. Dove and Perdomo, we would be entitled to a theory of the defense charge to the extent that it is, A, legally accurate, which I respectfully submit it is, and B, to the extent that it is supported by the evidence in the case, which I understand it to be. So I'm requesting it as well as a theory of the defense charge.

THE COURT: I will reserve on it. I have so to read it first.

MR. FERNICH: Let me give you my remaining objections to the enterprise charge as is.

In the second paragraph, the final sentence beginning with "as used in these instructions".

MR. SEIGEL: Which page, I'm sorry?

MR. FERNICH: Page 64.

THE COURT: As used in these instructions?

MR. FERNICH: Yes, sir.

As I understand it, there's no claim in this case that an individual partnership, corporation, association, or other legal entity is the enterprise here.

As I understand it, it is a pure association in fact enterprise. So I would shorten the sentence to read: As used in these instructions, the term "enterprise" means a quote union or group of individuals associated in fact, although not a legal entity.

MR. SEIGEL: Judge, I guess it is really - - that's quoted language right from the statute on what enterprise is. I think it just gives more context. We are not arguing that it is a corporation or a legal entity, but, nonetheless, it does give them a concept for the term "enterprise" is something that is defined broadly.

THE COURT: This is the language directly from the statute?

MR. SEIGEL: Yes, Judge.

THE COURT: I will reserve on that.

MR. FERNICH: Yes, sir.

Similarly, this rises and falls with the other objection. The term - - this is the first sentence of the last paragraph on page 64: The term enterprise as used in these instructions I would say is defined as a group of people associated in fact, even though this association is not recognized as a legal entity.

THE COURT: And you want to put "defined".

MR. FERNICH: Instead of "include".

[1163]

Charge Conference

THE COURT: May also include?

MR. FERNICH: Yes, sir. Same objection as the last one, basically.

THE COURT: Okay.

MR. FERNICH: The third sentence: "Thus, an enterprise need not be a formal business entity such as a corporation." We object to the last clause of that sentence beginning with "but".

THE COURT: Maybe merely an informal association.

MR. FERNICH: Yes, or it needs balancing language similar to that - - similar to that spelled out in the supplemental request to charge.

THE COURT: Okay. I told you I will reserve on that.

MR. FERNICH: Yes, sir.

The next sentence, "a group or association of people can be an enterprise if." I would say, among other requirements, these individuals have associated together, et cetera, et cetera.

THE COURT: Now, where did you get that language from?

MR. FERNICH: Well, I thought it up in my own head.

THE COURT: Brilliant.

MR. FERNICH: Thank you very much. I appreciate that.

MR. GEDULDIG: That's why he's my main brain.

THE COURT: I'm trying to get you a raise. You are not listening.

MR. FERNICH: Moving on to page 65, the first full paragraph, and this is consistent with what we have said before and the supplemental request to charge. I object to the phrase "without structural hierarchy".

THE COURT: Okay.

MR. FERNICH: And finally, we object to the last sentence beginning with "therefore," and continuing to the word burden. We object to that sentence because we think it understates the government's burden of proof with respect to establishing an association in fact enterprise.

THE COURT: Okay.

MR. FERNICH: Page 65, we are continuing to the next paragraph, and this, so that your Honor knows, is the charge we have the most objections to. It will move fast after this.

Regarding organization, we would write the sentence as follows: Regarding organization, the enterprise must have sufficient organization that its members functioned and operated, et cetera, et cetera. So we would take out the words "it is not necessary that,"

and the words have any particular or formal structure, but it.

THE COURT: What do you say about that?

MR. SEIGEL: Your Honor, we disagree with him completely. This is what they wish the law was because this is how they tried the case. But when you look at the cases, they are going to run up against it.

THE COURT: Okay.

MR. FERNICH: That's fine. The cases will speak for themselves, particularly Porcelli In that regard.

THE COURT: Okay. I remember Porcelli. Didn't he grind up or kill his girlfriend, or something like that?

MR. FERNICH: We don't worry about the facts here. We try to get the law.

THE COURT: I'm saying I remember the case.

MR. FERNICH: It could be. I'm sure it was a grisly case, though.

Moving to pages 67 through 68.

THE COURT: Go ahead.

MR. FERNICH: We object to the paragraph that goes from 67 over to 68 on the ground that it is not supported by the evidence in the case. I don't think these things are an issue. I don't think there's any claim that there was producing, distributing, or acquiring goods.

THE COURT: This is an element of the crime.

MR. FERNICH: Oh, yes, I understand, but factually this enterprise isn't doing any of these things.

THE COURT: Okay. Next.

MR. FERNICH: And paragraph 68 - - excuse me, page 68, paragraph two, we object to the following phrase regarding that alternative method of satisfying this element. It is just tied into the last objection to the paragraph before next.

***

[1198]

Charge Conference

MR. LIPTON: Judge, I know you reserved on their request about the language and supplemental instruction. If you want the government to be heard, obviously we oppose it. We believe that is not a correct statement.

THE COURT: Let me know in the morning.

I am interested in that case Percelli. I want to see what it says. This charge that I have is a standard Eastern District Second Circuit law. I will look at that.

MR. SEIGEL: Just to note, on page 20 of the request we submitted to you, we cited a footnote; several cases, very recent cases, that are directly on point saying *to establish an association in fact, RICO enterprise*. There is no proof of hierarchy required.

THE COURT: Hierarchy.

MR. LIPTON: Hierarchy. There is no proof there is a hierarchy in the organization.

THE COURT: Monolithic structural organization.

MR. SEIGEL: I am saying the Second Circuit said again and again you do not have to prove a structural hierarchy. You say Porcelli says otherwise.

MR. FERNICH: The bulk of the cases the

government has cited are civil cases, and there 's a world of difference in a civil pleading, standard civil RICO contention, and saying what has to be proved.

THE COURT: Just a second. We got Porcelli.

THE LAW CLERK: They are cited.

We'll look at that.

MR. SEIGEL: I don't think it is part of any instruction or has been in the Second Circuit that we must prove a hierarchy. Otherwise, none of these cases that have been before you with gangs and things like that would ever be made RICO.

MR. FERNICH: Ordinarily drug gangs regularly do have hierarchies with lieutenants and leaders, runners. There is some structural hierarchy in gangs. Diaz, Felicia and all the others, Miller, and all the other big drug cases that have come out of the second in the last five, ten years - -

THE COURT: Most gangs do not have a hierarchy.

MR. FERNICH: Your Honor would know that better than I.

THE COURT: I certainly would

MR. FERNICH: As I was saying, one brief point. It is one thing to say in a civil RICO case you don't have to plead structural hierarchy and it is another thing to say that in a criminal RICO case you don't have to prove

it. They are two very different things.

MR. SEIGEL: That is wrong. If it is an element of the crime or the element of the civil charge, you got to plead it. You got to prove it later. What these courts say, you don't have to plead it because it is not required legally.

MR. FERNICH: You don't have to plead it to withstand a Rule 12 motion under the Federal Rules of Civil Procedure.

THE COURT: I will look at Porcelli.

***

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---X
UNITED STATES OF AMERICA, : 03-CR-0970 (SJ)

-against- : U.S. Courthouse
Brooklyn, New York

EDMUND BOYLE, :

Defendant. : **TRANSCRIPT OF TRIAL**
March 14, 2005
---X 9:30 a.m.

TRANSCRIPT OF CRIMINAL TRIAL
BEFORE THE HONORABLE STERLING JOHNSON, JR.,
UNITED STATES SENIOR DISTRICT JUDGE, and a jury

APPEARANCES:

For the Plaintiff: ROSLYN R. MAUSKOPF, ESQUIRE
United States Attorney
By: THOMAS SIEGEL, ESQ.
JOEY LIPTON, ESQ.
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Court Reporter: FREDERICK P. GUERINO, C.S.R.
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***

[1373]
Charge of the Court

First, to prove the RICO substantive offense charged in Count One, the government must prove beyond a reasonable doubt the existence of an enterprise. As used in these instructions, the term "enterprise" includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

The term "enterprise" as used in these instructions may also include a group of people associated in fact, even though this association is not recognized as a legal entity. Indeed, an enterprise need not have a name. Thus, an enterprise need not be a form business entity such as a corporation, but may be merely an informal association of individuals. A group or association of people can be an "enterprise" if, among other requirements, these individuals "associate" together for a purpose of engaging in a course of conduct. Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what is does, rather than by abstract analysis of its structure.

Moreover, you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and that by evidence that the people making up the association functioned as a continuing unit. Therefore, in order to establish the existence of such an enterprise, the government must prove that: (1) There is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose.

Regarding "organization," it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise.

"Continuing membership" exists where the membership changes by adding or losing individuals during the course of its existence. Therefore, such an association of individuals may retain its status as an "enterprise" even though the membership of the association changes by adding or losing individuals during the course of its existence.

The government is not required to prove each and every allegation in the indictment about the enterprise or

[1375]

Charge of the Court

the manner in which the enterprise operated.

***

[1432]

Sidebar

THE COURT: Anything?

MR. SEIGEL: I had nothing else.

MR. GEDULDIG: Judge, we made our record earlier. Nothing else.

PETITIONER'S BRIEF

113 (4)

Supreme Court, U.S.
FILED
NOV 21 2008
OFFICE OF THE CLERK

No. 07-1309

In The

Supreme Court of the United States

OCTOBER TERM 2008

◆

EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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Question Presented

Must an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68, have some ascertainable structure beyond that inherent in the commission of predicate crimes – *i.e.*, patterns of racketeering activity, 18 U.S.C. § 1961(5) – by its members and associates?

Table of Contents

Opinion Below 1

Jurisdiction 2

Statutory Provisions 2

Overview: Drawing the Battle Lines 2

Statement of the Case 16

Summary of the Argument 22

Argument 24

An Association-in-Fact Enterprise Must Have Some Perceptible Structure Transcending Its Predicate Crimes 24

I. An Ascertainable Structure Requirement is Implicit in, and Compelled by, RICO's Plain Text and Meaning as Explicated in this Court's Cases 24

  A. *Turkette's* Plain Language Demonstrably Contemplates a Showing of Structure 24

  B. This Court's Other Key RICO Cases Uniformly Presume the Existence of a Structured Enterprise 31

1. *Reves*: Operators, Managers, Rungs and Ladders 31

2. *H.J.*: Relation, Continuity, Circularity and Federalism 34

II. RICO's Words and Structure – Interpreted Under Conventional Construction Canons and in the Broader Context of OCCA and VICAR – Mandate an Ascertainable Structure Requirement 37

A. Structure is Apparent in the Pertinent Statutory Titles 38

B. A Structured Enterprise Requirement Gives Effect to All of § 1962(c)'s Terms and Renders None Superfluous 39

C. A Structured Enterprise Requirement Conforms with § 1961(4)'s Surrounding Text 40

D. The Corollary VICAR Statute Shows that Structure is Intrinsic to a RICO Enterprise 44

E. RICO and OCCA Scrupulously Distinguish Enterprise and Conspiracy 46

III. An Ascertainable Structure Requirement Comports with RICO's Statutory Purpose and Legislative History 53

IV. A Structure Requirement Meshes with Common RICO Practice and Will Not Hinder the Statute's Enforcement 58

V. Principles of Lenity, Constitutional Avoidance and Constitutional Doubt Warrant an Ascertainable Structure Requirement 63

VI. Boyle's Conviction Should be Reversed 70

Conclusion 72

Table of Authorities

Page(s)

Cases:

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) . . . . *passim*

Apprendi v. New Jersey, 530 U.S. 466 (2000) 63

Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986 (8th Cir. 1989) 26

Bachman v. Bear, Stearns & Co., Inc., 178 F.3d 930 (7th Cir. 1999) 13

Beck v. Prupis, 529 U.S. 494 (2000) 40, 43

Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) 36

Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), *aff'd in part and rev'd in part on other grounds*, 710 F.2d 1361 (8th Cir. 1983) (*en banc*) 3

Blakely v. Washington, 542 U.S. 296 (2004) 63

Braverman v. United States, 317 U.S. 49 (1942) . 47

Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008) 3, 37, 42, 63

Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992) 8, 27, 31, 42, 62

Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453 (5th Cir. 1991) 6, 70

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 15, 25, 26, 32, 34, 37

Chang v. Chen, 80 F.3d 1293 (9th Cir. 1996), *overruled by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) (*en banc*) . . . . *passim*

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 42

City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425 (2d Cir. 2008) 9

Clark v. Martinez, 543 U.S. 371 (2005) 64

Ft. Wayne Books v. Indiana, 489 U.S. 46 (1989) . . 36

Genl. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) 41

H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) . . . . *passim*

Hudson v. United States, 522 U.S. 93 (1997) 69

Iannelli v. United States, 420 U.S. 770 (1975) 39, 47, 50

In re Winship, 397 U.S. 358 (1970) 64

Jacobellis v. Ohio, 378 U.S. 184 (1964) 36

Jones v. United States, 526 U.S. 227 (2000) 66

Jones v. United States, 529 U.S. 848 (2000) 66

Limestone Dev. Corp. v. Village of Lemont, Il., 520 F.3d 797 (7th Cir. 2008) 13, 30, 41, 44, 62

Mohawk Inds., Inc. v. Williams, No. 05-465, 2006 WL 1194498 (April 26, 2006) 48

Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 25, 52

Ocean Energy II v. Alexander & Alexander, Inc., 868 F.2d 740 (5th Cir. 1989) 10

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007) 7, 8, 11, 30, 41

Old Chief v. United States, 519 U.S. 172 (1997) . . 59

Pavlov v. Bank of New York Co., Inc., No. 01-7434, 25 Fed. Appx. 70, 2002 WL 63576 (2d Cir. Jan. 14, 2002) 9

Reves v. Ernst & Young, 507 U.S. 170 (1993) . . . . *passim*

Richards v. United States, 369 U.S. 1 (1962) 39

Richardson v. United States, 526 U.S. 813 (1999) 62, 66, 71

Russello v. United States, 464 U.S. 16 (1983) 2, 49, 51, 53, 67

Ryan v. Clemente, 901 F.2d 177 (1st Cir. 1990) 3

Salinas v. United States, 522 U.S. 52 (1997) . *passim*

Scheidler v. Nat'l Org. For Women, Inc., 547 U.S. 9 (2006) 36, 40, 46

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) . . . . . . *passim*

Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957) 42

Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004) 42

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983) 9, 21, 38

United States v. Bass, 404 U.S. 336 (1971) 68

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) 11, 12, 40

United States v. Booker, 543 U.S. 220 (2005) . 10, 63

United States v. Boyle, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) 1

United States v. Boyle, et al., 08 CR 523 (S.D.N.Y.) 21

United States v. Castellano, 610 F.Supp. 1359 (S.D.N.Y. 1985) 61

United States v. Concepcion, 983 F.2d 369 (2d Cir. 1992) 45

United States v. Daly, 842 F.2d 1380 (2d Cir. 1988) 59

United States v. Dunn, 442 U.S. 100 (1979) 68

United States v. Elliott, 571 F.2d 880 (5th Cir. 1978) 61

United States v. Eppolito, 543 F.3d 25 (2d Cir. 2008) 10

United States v. Eufrasio, 935 F.2d 553 (3d Cir. 1991) 59, 61

United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985) 9, 21

United States v. Fiel, 35 F.3d 997 (4th Cir. 1994) 45

United States v. Fisher, 6 U.S. (2 Cranch) 358 (1804) 38

United States v. Gaudin, 515 U.S. 506 (1995) 64

United States v. Goldin Inds., Inc., 219 F.3d 1271 (11th Cir. 2000) 9

United States v. Hassan, 542 F.3d 968 (2d Cir. 2008) 71

United States v. Huezo, No. 07-0031-cr, _ F.3d _, 2008 WL 4553150 (2d Cir. Oct. 14, 2008) 30

United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) *(en banc)* 60

United States v. Irizarry, 341 F.3d 273 (3d Cir. 2003) 47

United States v. Johnson, 440 F.3d 832 (6th Cir. 2006) 6, 13, 59, 62

United States v. Korando, 29 F.3d 1114 (7th Cir. 1994) 8, 10, 20, 35, 62

United States v. Kozminski, 487 U.S. 931 (1988) . 71

United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) 6, 30, 71

United States v. Krout, 66 F.3d 1420 (5th Cir. 1995) 61

United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982) 10, 41, 70

United States v. Locascio, 6 F.3d 924 (2d Cir. 1993) 59

United States v. Lopez, 514 U.S. 549 (1995) 36

United States v. Maloney, 71 F.3d 645 (7th Cir. 1995) 61

United States v. Mapp, 170 F.3d 328 (2d Cir. 1999) 44

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) 10

United States v. Mazzei, 700 F.2d 85 (2d Cir. 1983) 8

United States v. McDade, 28 F.3d 283 (3d Cir. 1994) 7

United States v. Mejia, Nos. 05-2586-cr *et seq.*, 545 F.3d 179, 2008 WL 4459289 (2d Cir. Oct. 6, 2008) 9, 59, 66

United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007) 8, 70

United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986) 3, 12

United States v. Olson, 450 F.3d 655 (7th Cir. 2006) 13

United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) 38

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001) 41

United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) 29

United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) (*per curiam*) 7, 8, 28

United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) 46

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983) 6, 13, 28, 34, 62

United States v. Richardson, 167 F.3d 621 (D.C. Cir. 1999) 7, 70

United States v. Rogers, 89 F.3d 1326 (7th Cir. 1996) 6, 8, 41, 44, 45, 65

United States v. Russotti, 717 F.2d 27 (2d Cir. 1983) 58

United States v. Santos, 128 S. Ct. 2020 (2008) 13, 14, 47, 62, 67

United States v. Smith, 413 F.3d 1253 (10th Cir. 2005) 6

United States v. Tellier, 83 F.3d 578 (2d Cir. 1996) 71

United States v. Tillett, 763 F.2d 628 (4th Cir. 1985) 6, 62, 70, 71

United States v. Torres, 191 F.3d 799 (7th Cir. 1999) 7, 30, 41, 70

United States v. Turkette, 452 U.S. 576 (1981) . . . . *passim*

United States v. Vastola, 899 F.2d 211 (3d Cir. 1990) 17

United States v. White, 116 F.3d 903 (D.C. Cir. 1997) 70

United States v. Williams, 128 S. Ct. 1830 (2008) 65

United States v. Wong, 40 F.3d 1347 (2d Cir. 1994) 61

United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145 (1965) 42

Statutes and Rules:

18 U.S.C. § 248(a)(3) 46

18 U.S.C. § 371 . . . . 13, 20, 21, 47, 48, 50

18 U.S.C. § 521 51

18 U.S.C. § 844 66

18 U.S.C. § 1511(a)(1) 48

18 U.S.C. § 1951 46

18 U.S.C. § 1952(b) 51

18 U.S.C. § 1955 . . . . 50, 51

18 U.S.C. § 1959 . . . . 21, 44, 46

18 U.S.C. § 1961(1) 43

18 U.S.C. § 1961(4) 2, 15, 20, 22, 24, 42, 53

18 U.S.C. § 1962(c) . . . . *passim*

18 U.S.C. § 1962(d) 13, 30, 48, 50, 63

18 U.S.C. § 1963(a) 13, 63

18 U.S.C. § 1963(f) 48

18 U.S.C. § 1964(a) 32

18 U.S.C. § 1964(c) 11, 68

18 U.S.C. § 2119 66

18 U.S.C. § 3575(e)(3) 48, 49

21 U.S.C. § 848(c)(2)(A) 51

28 U.S.C. § 1254(1) 2

29 U.S.C. § 186 43

29 U.S.C. § 501(c) 43

Fed. R. Evid. 404(b) 59, 60, 62

The Organized Crime Control Act, Pub. L. 91-452, 84 Stat. 922 (1970) 22, 43, 67

U.S.S.G. § 1B1.4 47

Other Authorities:

113 Cong. Rec. 17,950 (1967) (Sen. McClory) 57

115 Cong. Rec. 5,872 (1969) (Sen. McClellan) . . 53, 56

115 Cong. Rec. 5,874-75 (1969) (Sen. McClellan) . . 43

115 Cong. Rec. 5,876-77 (1969) (Sen. McClellan) 56, 57

115 Cong. Rec. 6,992-93 (1969) (Sen. Hruska) 55

115 Cong. Rec. 9,567 (1969) (Sen. McClellan) . . 54, 55

115 Cong. Rec. 9,568 (1969) (Sen. McClellan) 55

116 Cong. Rec. 585-86 (1970) (Sen. McClellan) 56

116 Cong. Rec. 591 (1970) (Sen. McClellan) 55

116 Cong. Rec. 601 (1970) (Sen. Hruska) 57

116 Cong. Rec. 607 (1970) (Sen. Byrd) 57

116 Cong. Rec. 18,914 (1970) (Sen. McClellan) 54

116 Cong. Rec. 18,940 (1970) (Sen. McClellan) . 15, 55

116 Cong. Rec. 35,309 (1970) (Rep. Minshall) 54

116 Cong. Rec. 35,343-44 (1970) (Rep. Celler) 55

116 Cong. Rec. 35,344 (1970) (Rep. Poff) 55

139 Cong. Rec. 9,923 (1993) (Sen. Simpson) 58

3 L. Sand, et al., Modern Federal Jury Instructions – Criminal (Matthew Bender) 32, 45, 60, 65

Alito, "Racketeering Made Simple(r)," in The RICO Racket (McDowell ed. 1989) 14, 37, 54

The American Heritage Dictionary of the English Language (3d ed. 1996) 26-28, 33, 42, 43

Blakey, "The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg," 58 N.D. L. Rev. 237 (1982) 5, 38, 57, 69

Blakey & Gettings, "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies," 53 Temp. L.Q. 1009 (1980) 25, 29, 38

Congressional Statement of Findings and Purposes, Pub. L. 91-452 § 1, 84 Stat. 922-23 (1970) 43, 53, 56, 67

Cressey, *The Functions & Structure of Criminal Syndicates, Task Force Report: the President's Comm'n on Law Enforcement & Admin. of Justice* (1967) 57

Dept. of Justice U.S. Attorney's Manual (1997) . . . 45

Eighth Cir. Pattern Jury Inst. 6.18.1962D 15, 20

Fifth Cir. Pattern Jury Inst. 2.78 . . . . 15, 65

Gardiner, "The Enterprise Requirement: Getting to the Heart of Civil RICO," 1988 Wis. L. Rev. 663 (1988) 15

Govt. Amicus Br. Supporting Respondents in *Mohawk Inds., Inc. v. Williams*, 2006 WL 680358 (March 16, 2006) 53

H.R. Rep. No. 91-1549 (1970) 56

Kiffel, "Reading the 'Enterprise' Element Back Into RICO: Sections 1962 and 1964(c)," 76 NW. U. L. Rev. 100 (1981) 11, 24, 51

Lynch, "RICO: The Crime of Being a Criminal, Parts I & II," 87 Colum. L. Rev. 661 (1987) 28, 49

Lynch, "RICO: The Crime of Being a Criminal, Parts III & IV," 87 Colum. L. Rev. 920 (1987) . . . . *passim*

Ninth Cir. Pattern Jury Inst. 8.129 42

O'Neill, "Functions of the RICO Enterprise Concept," 64 N.D. L. Rev. 646 (1989) 8

Rakoff & Goldstein, *RICO: Civil and Criminal Law and Strategy* (2001 ed.) 42

S. Rep. No. 91-617 (1969) 56

Seventh Cir. Pattern Jury Inst. 18 U.S.C. § 1961(4) 15, 20, 28

Tarlow, "RICO Revisited," 17 Ga. L. Rev. 291 (1983) 68

Tenth Cir. Pattern Jury Inst. 2.74.3, Cmt. 4

Tenth Cir. Pattern Jury Inst. 2.76.2 15

Vitter, "The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View," 62 Tul. L. Rev. 1419 (1988) 24, 40, 48

Webster's Third New International Dictionary (2002) 26-28, 33, 42-44

No. 07-1309

In The
Supreme Court Of The United States
October Term, 2008

EDMUND BOYLE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER EDMUND BOYLE

Opinion Below

The Second Circuit's unreported opinion, *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007), appears in the appendix to our *certiorari* petition.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1), having granted Edmund Boyle's timely *certiorari* petition Oct. 1, 2008.

Statutory Provisions

Primarily at issue in this case are 18 U.S.C. §§ 1961(4) and 1962(c). Section 1962(c) makes it

> unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

In turn, § 1961(4) defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, as relevant here, "any union or group of individuals associated in fact although not a legal entity."

Overview: Drawing the Battle Lines

RICO is a statute of undeniable "breadth," *Russello v. United States*, 464 U.S. 16, 21 (1983), sweeping far beyond the realm of traditional "organized crime." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492

U.S. 229, 243-49 (1989). That much is "familiar history." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985) (footnote omitted).

Broad, however, does not mean "boundless." *Ryan v. Clemente*, 901 F.2d 177, 180 (1st Cir. 1990) (Breyer, J.). And this Court has recognized that the concept of an "enterprise," the very "essence" of the statutory scheme,[1] serves as a "critical limitation" on RICO's potentially infinite scope. *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993).

Edmund Boyle does not ask this Court to rewrite or even restrict the statute. *Cf. Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008). He seeks only a reaffirmation – modest but important – of the enterprise element's primacy and centrality. *See, e.g., United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (the "central role" of RICO's enterprise concept "cannot be overstated"); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (enterprise element closes "floodgates" to torrent of "common law fraud claim[s]" dressed up as RICO violations) (footnote omitted), *aff'd in part and rev'd in part on other grounds*, 710 F.2d 1361 (8th Cir. 1983) (*en banc*).

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[1] Lynch, "RICO: The Crime of Being a Criminal, Parts III & IV," 87 Colum. L. Rev. 920, 942-43, 954 & n.149 (1987) ("Second Lynch Article").

Specifically, Boyle asks the Court to make explicit what it unmistakably implied almost 30 years ago in *United States v. Turkette*, 452 U.S. 576 (1981): that an association-in-fact enterprise must have some sort of structure beyond that attending the pattern of racketeering activity – the series of predicate crimes – in which its participants engage. *See, e.g.*, Tenth Cir. Pattern Jury Inst. ("PJI") 2.74.3, Cmt. ("CA10 Cmt.") (*Turkette* "suggest[s] that the enterprise must have an organization with a structure ... separate from the predicate acts themselves"); Second Lynch Article at 974 (*Turkette* "largely endorses" ascertainable structure requirement); *Chang v. Chen*, 80 F.3d 1293, 1298-99 (9th Cir. 1996) ("*Turkette* does not specify how much structure an [enterprise] must have"), *overruled by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (*en banc*).

In resolving that RICO reaches criminal enterprises as well as legitimate ones, *Turkette* delineated the nature and properties of associations-in-fact, taking care to distinguish them from the statute's separate pattern component. In the passage vital to this case, the Court declared:

> [T]o secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose

> of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an **ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.** The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, **proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the government.**

452 U.S. at 583 (footnote omitted) (emphasis supplied).

One "problem" raised by *Turkette* concerns "the extent to which the defendant's association with others arising from the joint commission of ... predicate acts can be construed as an association-in-fact enterprise." CA10 Cmt.; *cf.* Blakey, "The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*," 58 N.D. L. Rev. 237, 326 (1982) ("Blakey") ("little difficulty exists in discerning and establishing the elements of 'enterprise' and 'pattern'" where "legitimate entities are involved").

To ensure the obligatory separation, most circuit courts correctly read *Turkette* to require that an association-in-fact have some perceptible operating structure aside – though permissibly inferable – from that inherent in the predicate acts themselves. *See, e.g., United States v. Riccobene*, 709 F.2d 214, 222-24 (3d Cir. 1983) (hierarchical or consensual decision-making structure beyond that necessary to commit each racketeering act); *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) ("continuity of structure and personality"); *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461-62 (5th Cir. 1991) (hierarchical or consensual decision-making structure; continuity of structure and personnel) (citations and quotations omitted); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) ("ongoing structure of persons associated through time, joined in purpose, and organized in [ ] manner amenable to hierarchical or consensual decision-making") (citations and internal quotes omitted); *United States v. Rogers*, 89 F.3d 1326, 1337 (7th Cir. 1996) ("The hallmark of an enterprise is structure.") (citation and internal quotes omitted); *United States v. Kragness*, 830 F.2d 842, 855-56 (8th Cir. 1987) (ascertainable structure distinct from that inherent in pattern of racketeering; organizational pattern or system of authority providing continuing directional mechanism) (citations omitted); *United States v. Smith*, 413 F.3d 1253, 1266-67 (10th Cir. 2005) (ongoing organization with decisional framework and control mechanism apart from pattern); *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999) ("some structure" necessary to distinguish enterprise from "mere conspiracy") (citation and internal quotes omitted); *but see United States v. Perholtz*, 842 F.2d 343, 363-64 (D.C. Cir. 1988) (*per curiam*) (structure need not be "particular or formal") (citation omitted).

Sophistication and "access to resources" distinguish coordinated criminality from ordinary "individual and group crime." *Chang*, 80 F.3d at 1298-99 (citations and internal quotes omitted). From that premise, these courts sensibly reason that an enterprise must be something more than just a "group of people who get together to commit a pattern of racketeering." *United States v. Torres*, 191 F.3d 799, 806 (7th Cir. 1999); *see, e.g., United States v. McDade*, 28 F.3d 283, 295 (3d Cir. 1994) (Alito, J.) (RICO enterprise "must be something more than simply the pattern of racketeering activity through which the racketeers conduct[] or participate[] in its affairs") (citations and footnote omitted). As one bloc of judges, echoing *Turkette*, aptly put it, "RICO targets a more sophisticated crowd": ongoing organizations with "some minimal structure, coordination, or ordering principle[.]" *Odom*, 486 F.3d 541, 555 (Silverman, J., joined by Rymer, Tallman, Rawlinson and Bea, JJ., *concurring in result*).

For these courts, some degree of structure – however proved, by the pattern or otherwise – supplies the necessary distinguishing feature at negligible cost to the plaintiff or prosecutor. *See, e.g., Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992) (Posner, J.) ("some" structure, but not "much," required to distinguish an enterprise). As Judge Bork and a D.C. Circuit panel said in an unsigned opinion: "The same group of individuals who repeatedly commit predicate offenses do not necessarily constitute an enterprise. An extra ingredient is required: organization." *Perholtz*, 842 F.2d at 364; *cf. Rogers*, 89 F.3d at 1337 ("an 'enterprise' is something more structured, more organized than a band of criminals").

Other circuits – a distinct minority – take a different approach, removing even that "very low hurdle" from the government's burden. *United States v. Korando*, 29 F.3d 1114, 1117 (7th Cir. 1994); *see* O'Neill, "Functions of the RICO Enterprise Concept," 64 N.D. L. Rev. 646, 713 (1989) ("O'Neill") ("not difficult" to establish valid enterprise). Confusing the elements of an offense with the evidence used to prove them, they have seized on this Court's observation that pattern and enterprise proof "may in particular cases coalesce," 453 U.S. at 583, to hold that an association-in-fact need not have *any* identifiable structure. *See, e.g., United States v. Nascimento*, 491 F.3d 25, 33-34 (1st Cir. 2007) (jury so charged and "instruction has been approved as good law in this circuit") (citation omitted); *United States v. Mazzei*, 700 F.2d 85, 87-89 (2d Cir. 1983) (rejecting ascertainable structure requirement); *Odom*, 486 F.3d at 551-52 (no "requirement that the enterprise have an 'ascertainable structure'"); *United States v. Goldin Inds., Inc.*, 219 F.3d 1271, 1274-75 (11th Cir. 2000) (enterprise "need not possess an ascertainable structure distinct from the associations necessary to conduct the pattern") (citation omitted).

And at least one circuit – the Second, Boyle's home circuit – has decisively dropped the other shoe, incrementally extending that faulty premise to its inevitable conclusion: a virtual *per se* rule that RICO applies "where the enterprise [i]s, in effect, no more than the sum of the predicate racketeering acts." *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983) (collecting cases); *accord United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985) ("RICO charges may be proven even when the enterprise and predicate acts are functionally equivalent") (citations and internal quotes omitted).[2]

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[2] The Second Circuit has not always spoken with one voice on this issue. *Cf., e.g., United States v. Mejia*, Nos. 05-2586-cr *et seq.*, 545 F.3d 179, 2008 WL 4459289, at *20 (2d Cir. Oct. 6, 2008) (noting that charged enterprise, a nationwide street gang, had "leadership structure" separate from "series of predicate acts"); *City of New York v. Smokes-Spirits.Com, Inc.*, 541 F.3d 425, 451 (2d Cir. 2008) (affirming partial dismissal of civil RICO complaint for failure to adequately allege "continuity of structure and personnel" or "consensual decision-making structure") (internal quotation marks omitted). Still, *Bagaric* and *Ferguson* survive, continuing to generate cursory unpublished opinions like the one in this case. *See, e.g., Pavlov v. Bank of New York Co., Inc.*, No. 01-7434, 25 Fed. Appx. 70, *71-*72, 2002 WL 63576, at **1-**2 (2d Cir. Jan. 14, 2002) ("We have repeatedly found a sufficient

(continued...)

The minority view fundamentally misconstrues *Turkette.* First, as the Second Circuit's position demonstrates, eliminating any structure requirement effectively "equate[s]" enterprise with pattern, *United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982), collapsing "two statutory elements" into one, *Korando*, 29 F.3d at 1117 (citation and internal quotes omitted). In turn, that renders the enterprise wholly "superfluous," *Chang*, 80 F.3d at 1298, defying *Turkette*'s clear mandate – "[t]he existence of an enterprise at all times remains a separate element which must be proved"[3] – and relieving the government's burden of establishing every essential offense element beyond a reasonable doubt. *See, e.g., United States v. Booker*, 543 U.S. 220, 230 (2005).

The minority view thus reduces the enterprise to "just a[nother] name for the crimes the defendants commit[ ]"[4] – a bare "summation of predicate acts," *Ocean Energy II v. Alexander & Alexander, Inc.*, 868

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[2](...continued)
enterprise where the complaint alleges a group without [structural] hierarchy") (collecting cases); *cf. United States v. Eppolito*, 543 F.3d 25 (2d Cir. 2008) (apparently unstructured enterprise composed of two corrupt police officers).

[3] 452 U.S. at 583 (footnote omitted).

[4] *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.).

F.2d 740, 748 (5th Cir. 1989) – effectively reading it out of the statute. As one commentator cogently notes:

> This is not simply a matter of overlapping proof of two distinct elements of the crime. Rather, it is a construction whereby one element is completely swallowed by another. Such a result is unacceptable.

Kiffel, "Reading the 'Enterprise' Element Back Into RICO: Sections 1962 and 1964(c)," 76 Nw. U. L. Rev. 100, 110-11 n.64 (1981) ("Kiffel").

Second, since organization and common purpose are attributes of all joint criminal activity,[5] renouncing structure makes every long-term conspiracy an "*ipso facto*" enterprise, *Odom*, 486 F.3d at 555 (opinion concurring in result), reducing RICO to an "aggravated conspiracy statute"[6] with a drastically enhanced penalty. *See H.J.*, 429 U.S. at 233, 243 n.4 (describing RICO's "severe" penalty provisions). As the Eighth Circuit explains:

> [A]n enterprise cannot simply be the undertaking of the acts of racketeering ... [or] the minimal association ...

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[5] *See United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) ("Any two wrongdoers who through concerted action commit two or more crimes share a purpose.").

[6] Second Lynch Article at 923 (footnote omitted).

> surround[ing] the[m].... Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself. Thus unless ... the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to [it], the Act simply punishes the commission of two of the specified crimes [in a pattern].

Bledsoe, 674 F.2d at 664; *see also id.* at 659 (RICO not a "catchall reaching all concerted action of two or more criminals involving two or more" predicate crimes).

Thus, contrary to the minority approach, the terms "enterprise" and "conspiracy" are "not synonymous," *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir. 1986), and a run-of-the-mill conspiracy does not and cannot rise to a cognizable RICO enterprise, *see Chang*, 80 F.3d at 1300 (citation omitted). Indeed, absent some special "threat" of "harm," long-term group crime would not justify a statute going "beyond conventional conspiracy doctrine," which already examines "an extended course of conduct by one or more individuals." Second Lynch Article at 933, 974. Structure – an enterprise's "hallmark"[7] and "central element"[8] – provides both the threat and the justification, distinguishing RICO from conspiracy *simpliciter* and rationalizing its harsh "additional"[9] sanctions. *Compare* 18 U.S.C. § 371 (five-year penalty for general conspiracy) *with* 18 U.S.C. § 1963(a) (20-year penalty for RICO offense).

Without structure, conversely, "'enterprise' collapses to 'conspiracy,'" *Limestone Dev. Corp. v. Village of Lemont, Il.*, 520 F.3d 797, 805 (7th Cir. 2008) (Posner, J.), making every agreement to commit predicate crimes an enterprise and every conspirator a racketeer. "That is not the law." *Bachman v. Bear, Stearns & Co., Inc.*, 178 F.3d 930, 932 (7th Cir. 1999) (Posner, C.J.); *cf. Salinas v. United States*, 522 U.S. 52, 65 (1997) (juxtaposing operation of § 1962(c) "enterprise" with § 1962(d) "conspiracy" while recognizing that the "two crimes" may factually coincide). For it would invite the addition of RICO counts to every § 371 indictment, authorizing extra convictions and automatic sentence boosts for the very same conduct – an idea analogously rejected by a plurality of this Court just last Term. *Cf. United States v. Santos*, 128 S. Ct. 2020, 2026-27 (2008).

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[7] *Johnson*, 440 F.3d at 840 (citation and internal quotes omitted).

[8] *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006) (citation and internal quotes omitted).

[9] *Riccobene*, 709 F.2d at 221.

In sum, it is one thing to acknowledge that RICO, while primarily "target[ing] organized crime," *Anza v. Ideal Supply Corp.*, 547 U.S. 451, 463 (2006) (Thomas, J., *concurring and dissenting*), is not so limited. *Cf. id.* at 479 (Breyer, J., *concurring and dissenting*) ("central purpose[]" is "prevent[ing] organized criminals from taking over or operating legitimate businesses"). But it is "worlds apart"[10] to suggest that an enterprise requires no structure at all, doing away with the notion entirely. That goes too far to the opposite extreme, turning the statutory rationale on its head and relegating the core enterprise concept to a legal fiction.

After all, RICO essentially makes it a crime to "function as a member of an organized criminal group," Alito, "Racketeering Made Simple(r)" at 4, in *The RICO Racket* (McDowell ed. 1989) ("Alito Article"), capturing other offenders only incidentally, so as to reach organized crime in all its diversity. As the Act's main sponsor conceded:

> Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial

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[10] *Santos*, 128 S. Ct. at 2030 (plurality opinion).

> activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

116 Cong. Rec. 18,940 (1970) (Sen. McClellan); *see also, e.g., id.* at 18,913-14 (Sen. McClellan) (key provisions confined to organized crime "to the maximum degree possible").

An identifiable structure requirement – contemplating some ongoing directional apparatus, though not the reticulation of, say, a corporation or Mafia family – resolves that tension and fulfills the statutory purpose "in a formulation that is easy to apply." *Reves*, 507 U.S. at 179.[11] It enforces Congress's will without cramping RICO's breadth, compromising its integrity or hobbling its effectiveness. It is faithful to legislative history and compelled by the statutory language, context and framework as construed in this Court's precedents. And it reflects the realities on the ground, mirroring prevailing law and practice in everyday RICO cases.

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[11] As noted, seven circuits already employ some kind of structure test, and several incorporate variants in their pattern jury instructions, "without creating discernible mischief" in RICO's "administration." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001) (citations omitted). *See* Seventh Cir. PJI 18 U.S.C. § 1961(4); Eighth Cir. PJI 6.18.1962D; *cf.* Fifth Cir. PJI 2.78; Tenth Cir. PJI 2.76.2. Given its widespread use and lengthy pedigree, there can be no claim that a structure test – unlike, say, a "scheme," "racketeering injury" or "organized crime" requirement – is vague, unworkable or hard to explain to a jury. *Cf. H.J.*, 492 U.S. at 241 n.3, 248; *Sedima*, 473 U.S. at 493-500. To the contrary, the test is "simple and vivid," as crooks "allied for the limited purpose of engaging in several [criminal] episodes ... will [rarely] create any more structure than absolutely necessary to pull [them] off." Gardiner, "The Enterprise Requirement: Getting to the Heart of Civil RICO," 1988 Wis. L. Rev. 663, 683-84 (1988).

For all these reasons, amplified below, some requirement of structure should be – and inescapably is – an "essential part" of the enterprise "definition." Second Lynch Article at 974-75; *see* CA10 Cmt. (most circuits focus on "structure and organization" as enterprise's "critical defining element").

Statement of the Case

This case illustrates the "enigmatic" nature of the association-in-fact concept, *cf. H.J.*, 492 U.S. at 251 (Scalia, J., joined by Kennedy and O'Connor, JJ., and Rehnquist, C.J., *concurring in the judgment*), showing how far it has been stretched beyond permissible bounds.

A grand jury indicted Boyle and eight codefendants on, *inter alia*, RICO and RICO conspiracy charges, alleging that he participated in a 10-year run of interstate bank burglaries – and a single bank robbery on which the *petit* jury hung – as part of a putative association-in-fact enterprise called the "Night Drop Crew." (Govt. COA App. 1-33.) From the start, the defendants attacked the enterprise as a fantasy. Most pointedly, they argued in pretrial motions that the government had ascribed some of the same crimes to other purported enterprises with allegedly overlapping members – for example, the "Bank Crew" and the "New Springville Boys" – in earlier prosecutions. (Def. COA App. 63-240.) Accordingly, the defendants maintained, the government was inventing enterprises to suit its prosecutorial needs, imputing the same offenses to different "artificial" constructs on a case-by-case basis. Second Lynch Article at 954 n.149 (enterprise element "sufficiently artificial that a defendant would [often] be surprised to learn ... he was part of one").

After the motions were filed and most of the defendants had pled guilty – leaving Boyle as the principal remaining defendant and the only one eventually to stand trial – the government superseded the indictment to name yet another enterprise. This time it swapped the "Night Drop Crew" moniker for the more expedient "Boyle Crew," Govt. COA App. 34-63; Def. COA App. 48-62. *Cf. United States v. Vastola*, 899 F.2d 211, 232 (3d Cir. 1990) (cautioning against alleging eponymous enterprise).

Boyle continued to challenge the enterprise's existence at trial, exposing it – through cross-examination of the government's own accomplice witnesses – as a shapeless and sprawling "clique" of "friends" who periodically burgled night deposit boxes in shifting combinations. JA 68, 75 (prosecution witness Gerard Bellafiore characterizing "Crew" as an iteration of "all of the people named in the indictment basically"). Indeed, the accomplice witnesses themselves described the supposed "Boyle Crew" as a loose band of "free floaters" without a unifying "plan" or "understanding" – ongoing, "formal," "informal" or otherwise. *See, e.g.,* JA 45-47 (Christopher Ludwigsen a.k.a. Paciello ("Paciello")); JA 86 (Blas Salvatore "Fat Sal" Mangiavillano); JA 79 (Bellafiore). Rather, "different people" would commit crimes at "different times" and "places" – on an "individual," *ad hoc* and impromptu basis – with no set "crew" or "group" backing. *See, e.g.,* JA 45-47 (Paciello); JA 83 (Bellafiore: no group "requirements"); JA 94 (Mangiavillano "[n]ever heard" of Boyle Crew).

More specifically, the cooperators variously admitted that:

- "Nobody had any type of standing where he was the boss...." JA 45 (Paciello).
- "[T]here was **no organization at all.**" JA 45 (Paciello) (emphasis supplied); *accord* JA 79 (Bellafiore) (similar).
- "**Each individual crime withstood by itself.**" JA 45 (Paciello) (emphasis supplied).
- There was no "ongoing informal plan" among a "group of people to commit crimes so ... the group could profit." JA 46 (Paciello).

- Individual conspirators "did crimes together" but **not** "as a group." *Id.* (emphasis supplied).

- "[T]here was **no** leadership" or "informal understanding among the group." JA 47 (Paciello) (emphasis supplied); *accord* JA 79 (Bellafiore) (no "leader[s]" or "formal understanding").

- "[I]t was just who was available to do the job when it came up." JA 47 (Paciello); *accord* JA 76-77 (Bellafiore) (similar); T: 1329 (govt. rebuttal summation) ("These people ... commit ... bank crimes ... with a lot of different people, ... who[ever is] available").

At the close of the evidence, Boyle requested the following jury instruction on RICO's enterprise element:

> To establish an association-in-fact enterprise, the government must convince you, beyond a reasonable doubt, that the alleged Boyle Crew had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts. If the government fails to meet this

> **burden, you must acquit Mr. Boyle on the RICO counts.**

JA 95 (citations and footnote omitted) (emphasis supplied). *Cf., e.g.,* Eighth Cir. PJI 6.18.1962D (government must prove a "structure distinct from that necessary to conduct the pattern"); Seventh Cir. PJI 18 U.S.C. § 1961(4) ("some form or structure beyond the minimum necessary to conduct the [] pattern"); *Korando,* 29 F.3d at 1118 (jury "properly instructed" that enterprise must have structure "separate from the commission of the predicate acts").

The District Court denied the request, telling the jury, over objection, JA 97-109, just the opposite: "you may find an enterprise where an association of individuals, **without structural hierarchy**, forms solely for the purpose of carrying out a pattern of racketeering acts." JA 112 (emphasis supplied); *see also* JA 111-12 ("Common sense suggests that the existence of an association is oftentimes more readily proven by what it does, **rather than by abstract analysis of its structure.**") (emphasis supplied); JA 112 ("it is **not** necessary that the enterprise have **any particular or formal structure**") (emphasis supplied).

The jury convicted Boyle on 11 counts, including both racketeering charges and a five-year bank burglary conspiracy count, 18 U.S.C. § 371, subsuming all the proven predicate acts. (Def. SPA 1-8.) The District Court imposed a 151-month sentence (12½ years). (*Id.*)

Boyle continued to press the enterprise point on appeal, arguing that the government violated due process by attributing the same crimes to different enterprises in successive prosecutions. (Def. COA Br. 12-19.) He also contested the enterprise instruction and evidence, claiming it failed to prove a structured entity distinct from the predicate bank burglaries – the issues now before this Court. (*Id.* 19-38, 49.)[12] The Second Circuit summarily rejected those challenges, presumably relying on *Bagaric* and *Ferguson,* but remanded for resentencing on unrelated grounds. Cert. Pet. App. 3-4.

On remand, the District Court cut Boyle's sentence by 33 months. Boyle is serving his sentence while facing separate capital charges under, *inter alia,* 18 U.S.C. § 1959, the Violent Crimes in Aid of Racketeering Act (VICAR). *United States v. Boyle, et al.,* 08 CR 523 (S.D.N.Y.) (CM). Given those charges and Boyle's nine intact bank burglary convictions – including the global § 371 conspiracy – there is little risk of a windfall should he prevail in this Court.

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[12] Alternatively, Boyle asserted that the evidence showed only multiple enterprises rather than the unitary one alleged in the indictment. (Def. COA Br. 38-49.)

Summary of the Argument

I. In language and logic, *Turkette*'s description of an associative "enterprise" – a separate "*entity*" with "ongoing *organization*" and a "*continuing* unit" of associates – implicitly assumes some degree of structure. A structure requirement also complements and inheres in this Court's interpretation of RICO's other main ingredients: "conduct," necessitating an organic entity to operate and manage (*Reves*), and "pattern," allowing an inference of continuity from a true criminal enterprise (*H.J.*).

II. A structure requirement is apparent in (A) the titles of RICO and the Organized Crime Control Act (OCCA)[13]; (B) § 1962(c)'s text interpreted under the anti-nullification canon; (C) § 1961(4)'s plain terms read in context; (D) the ancillary VICAR statute's "maintain or increase" enterprise "position" element; (E) the government's own concession that VICAR requires an ascertainably structured enterprise apart from its racketeering activity; and (F) RICO's and OCCA's meticulous distinction between enterprise and conspiracy.

III. A structure requirement accords with RICO's legislative history, focusing on organized crime and its infiltration of business, labor unions and government – all structured entities.

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[13] Pub. L. 91-452, 84 Stat. 922 (1970), incorporating RICO as Title IX.

IV. A structure requirement matches the realities of daily RICO practice and will not impair the statute's enforcement, as the government customarily proves enterprise structure as a pillar of its RICO litigation strategy.

V. Lenity requires a structured enterprise to avoid grave Fifth and Sixth Amendment problems – involving vagueness, lack of fair notice and relieving an essential element of the government's burden of proof – attending the contrary view.

VI. Boyle's conviction must be reversed for legal insufficiency and instructional error, or the case remanded for application of the ascertainable structure test in the first instance.

ARGUMENT

AN ASSOCIATION-IN-FACT ENTERPRISE MUST HAVE SOME PERCEPTIBLE STRUCTURE TRANSCENDING ITS PREDICATE CRIMES

I. AN ASCERTAINABLE STRUCTURE REQUIREMENT IS IMPLICIT IN, AND COMPELLED BY, RICO'S PLAIN TEXT AND MEANING AS EXPLICATED IN THIS COURT'S CASES

A. *TURKETTE*'S PLAIN LANGUAGE DEMONSTRABLY CONTEMPLATES A SHOWING OF STRUCTURE

In interpreting a statute, this Court looks "first to its language." *Turkette*, 452 U.S. at 580. At issue is the undefined phrase "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). This provision has been aptly termed "nebulous," Kiffel at 104, and "amorphous," Second Lynch Article at 973. *Accord, e.g.*, Vitter, "The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View," 62 Tul. L. Rev. 1419, 1448 (1988) ("Vitter") ("statutory definition" is "very concise and of little help in the case of illegitimate enterprises. And no legislative history regarding illegitimate enterprises exists.").

But this Court does not write on a blank slate in construing the clause. Rather, *Turkette* outlined the contours of an association-in-fact enterprise, referring to it twice as an "entity." 452 U.S. at 583. The entity also must be separate from the pattern of activity in which it engages – again repeated twice – with an "ongoing organization" and a "continuing unit" of associates. *Id.*

Indeed, the government itself proposed a similar definition in *Turkette*, casting the enterprise as an "independent **entity**" whose existence must be "shown." *Id.* at n.5 (citation and internal quotes omitted) (emphasis supplied). And this Court has routinely returned to the "entity" label in subsequent cases. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260-61 (1994) ("*Scheidler I*") ("'enterprise'" includes wholly criminal "**entities**") (emphasis supplied); *H.J.*, 492 U.S. at 242 (predicate acts may be "part of an ongoing **entity**'s regular way of doing business") (emphasis supplied); *Kushner*, 533 U.S. at 160-61 (enterprise is a distinct entity, not simply the RICO "person" by a different name). *See also, e.g.*, Blakey & Gettings, "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies," 53 Temp. L.Q. 1009, 1023 n.81, 1025-29 n.91 (1980) ("Blakey & Gettings") (repeatedly describing enterprise as a "separate entity").

An "entity" suggests something concrete, real and tangible – something that has an "objective or physical reality and distinctness of being and character." Webster's Third New International Dictionary 758 (2002) ("Webster"). It "exists as a particular and discrete unit" considered "apart from its properties,"[14] a definition that closely tracks *Turkette's* "separate and apart from [its] pattern" formulation. Put another way, an "entity" is a "self-contained" being with a "unitary" character and an "independent or separate existence," as "contrasted with its attributes or properties." Webster at 758.

The attributes and properties of an association-in-fact are, manifestly, its participants and the acts they commit. Thus, to constitute an enterprise as conceived in *Turkette* – that is, a discrete, independent "entity" existing apart from its properties – it follows that such an association must be something more than just the sum of those acts and participants. *See, e.g.*, *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) (a "collective entity is something more than the members of which it is comprised"). It must be more than a mere combination of its constituents and predicate crimes, *i.e.*, whom it comprises and what they do. *See Turkette*, 452 U.S. at 583 (enterprise is an entity "separate and apart from the pattern of activity in which it engages"); *Kushner*,

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[14] The American Heritage Dictionary of the English Language 615 (3d ed. 1996) ("American Heritage").

533 U.S. at 161 (enterprise is an entity distinct from RICO person); *Reves*, 507 U.S. at 185 (defendants must conduct "the enterprise's affairs, not just their own") (internal quotes omitted); *cf. H.J.*, 492 U.S. at 237 (statute assumes there is "something to a RICO pattern beyond the simple number of predicate acts involved") (emphasis omitted).

That something more – the quality that makes an association an "entity" – is a cohesive structure. For it is structure that forms an "entity" from a clot of elements and component parts – here, an association's members and how they behave. *See* Webster at 2267 (defining "structure" as "the elements or parts of an entity or the position of such elements and parts in their external relationships to each other"); American Heritage at 1782 (defining "structure" as "the interrelation or arrangement of parts in a complex entity"); *accord, e.g., Burdett*, 957 F.2d at 1379 (equating "structure" with "identifiable entity").

Any linguistic doubt on this score – and there can be none – is resolved by the definition of "organization," the second key associational feature identified in *Turkette*. In plain English, "organization" means an "organic structure" or "purposive systematic arrangement," Webster at 1590, or a "structure through which individuals cooperate systematically to conduct business." American Heritage at 1275.[15] And, concomitantly, "structure" means "something having a definite or fixed pattern of organization," or "the way in which the parts of something are put together or organized." Webster at 2267.

As these definitions indicate, the words "organization" and "structure" are virtually synonymous. *See id.* (defining verb "structure" as "to form into an organized structure"); *id.* (defining "structured" as "exhibiting organized structure"); American Heritage at 1782 (defining "structured" as "Highly organized"); *cf.* Webster at 2267 (defining "structureless" as "lacking definite structure or organization"). Thus, by equating an "enterprise" with an "ongoing organization," *Turkette* necessarily anticipates some sort of structural showing. *See, e.g.*, Lynch, "RICO: The Crime of Being a Criminal, Parts I & II," 87 Colum. L. Rev. 661, 662 n.11 (1987) ("First Lynch Article") ("'organized'" means "relatively structured"); Seventh Cir. PJI 18 U.S.C. § 1961(4) (consider whether putative enterprise has "ongoing organization or structure"). As discussed in our Overview (*see supra* 4), many authorities recognize as much, using "organization" and "structure" all but interchangeably. *See, e.g., Riccobene*, 709 F.2d at 12 ("'ongoing organization requirement'" refers to group's "superstructure or framework"); *Perholtz*, 842 F.2d at

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[15] We read the "business" reference as illustrative rather than exclusive.

362 ("The second element – 'organization' or 'structure' – is the most difficult to show."); *Chang*, 80 F.3d at 1300 ("Appellants have failed to allege an organization, formal or informal, with sufficient structure to satisfy RICO's enterprise element.").

In sum, an ascertainable structure requirement is implicit in the prime enterprise traits enumerated in *Turkette*: those of a separate "entity" with an "ongoing organization" and "continuing" personnel. If the government's pattern evidence suffices to establish a structured entity, formal or informal – *i.e.*, where the jury can infer some independent organization from the nature, frequency and duration of the predicate acts – then nothing more is required. On the other hand, if the pattern proof alone is not sufficient to support such an inference, then additional evidence of structure will be necessary. *See, e.g.*, Blakey & Gettings at 1027 n.91 (confirming that enterprise is "a separate entity as opposed to just [multiple] individuals acting together," and recognizing that pattern evidence may or may not suffice to infer its existence); *United States v. Pelullo*, 964 F.2d 193, 211 (3d Cir. 1992) (structural inquiry is fact question for properly instructed jury).[16] Again, many courts agree, finding structure fully commensurate with the *Turkette* criteria. *See, e.g.*, *Kragness*, 830 F.2d at 855 (equating *Turkette*'s "ongoing organization" and "continuing unit" language with "continuity of structure" and personnel); *Limestone*, 520 F.3d at 805 (ongoing structure requirement echoes *Turkette*'s "continuing unit" language); *Torres*, 191 F.3d at 806 (equating continuity and structure).[17]

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[16] This approach parallels *H.J.*'s observation that, depending on the circumstances, proof of a defendant's participation in just two racketeering acts – or of his involvement in "multiple criminal schemes" – may or may not suffice to establish a RICO pattern. *See* 492 U.S. at 237-38, 240-41; *cf., e.g., id.* at 239 (pattern's "constituents," relatedness and continuity, are analytically distinct
(continued...)

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[16](...continued)
though their proof may "overlap"); *Salinas*, 522 U.S. at 65-66 (juxtaposing "enterprise" with "predicate acts" while noting that defendant's commission of two such acts may help tie him to enterprise in § 1962(d) cases).

[17] Though largely mimicking the *Turkette* factors, an ascertainable structure requirement is neither redundant nor superfluous. As evidenced by the deep circuit split on this issue, *Turkette*'s "explanation of the meaning of an associated-in-fact enterprise" has not been "clearly understood in the lower courts," *Odom*, 486 F.2d at 549. A structure requirement will clarify the "[c]onfusion," *id.*, reason enough to adopt it explicitly. *See H.J.*, 492 U.S. at 235-36 (citing "plethora" of divergent judicial "views" as reason for tightening RICO pattern definition). More fundamentally, a structure requirement will dispel the "unacceptable" misconception implicit in the minority position: that enterprise is "subject to a lesser standard of proof" than pattern – one short of reasonable doubt – in illicit association cases. *Cf. United States v. Huezo*, No. 07-0031-cr, _ F.3d _, 2008 WL 4553150, at *9 (2d Cir. Oct. 14, 2008) (concurring opinion of Newman, J., joined by full panel). In sum, an express structure requirement will ensure that the enterprise "remains a separate element which must be proved," *Turkette*, 452 U.S. at 583 – not
(continued...)

B. THIS COURT'S OTHER KEY RICO CASES UNIFORMLY PRESUME THE EXISTENCE OF A STRUCTURED ENTERPRISE

Turkette's tacit premise – that an enterprise must have some type of structure – is validated by this Court's subsequent decisions in *Reves* and *H.J.* RICO is a statute with many moving parts, and they must be read in conjunction, not isolation, to work in unison. A structure requirement serves that purpose, going hand-in-glove with the Court's interpretation of § 1962(c)'s other "predominant" elements: namely, the enterprise's "conduct" through a "pattern of racketeering activity." *Salinas*, 522 U.S. at 476 (citation omitted).

1. *Reves*: Operators, Managers, Rungs and Ladders

In *Reves*, the Court pondered what it means to "conduct" or "participate ... in the conduct of [an] enterprise's affairs." *See* 18 U.S.C. § 1962(c). To do so, the Court said, a defendant must "participate in the operation or management of the enterprise itself," playing "some part" in its direction or control. 507 U.S. at 178-79, 183, 185; *cf.* *Burdett*, 957 F.2d at 1379

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[17] (...continued)
mere window-dressing or a pseudonym for pattern – and that lower courts pay it more than just lip service.

("some" structure necessary to distinguish enterprise from pattern).[18]

Like *Turkette*, *Reves* plainly contemplates the existence of a structured enterprise, pinning its operation and management test on that very assumption.

First, *Reves* distinguishes the affairs of an enterprise from an enterprise itself, suggesting the enterprise is a separate animal that has and is capable of having affairs. *Cf.* 18 U.S.C. § 1964(a) (juxtaposing "enterprise" with "endeavor[s]"); *Kushner*, 533 U.S. at 165 (recognizing that an enterprise has "purposes").

Second, in requiring that a defendant play some part in directing the enterprise itself – as opposed to its affairs or those of its participants – *Reves* confirms that an enterprise is something different and greater than either or both of those ingredients, *i.e.*, something more than just a euphemism for its members and activities. *See Reves*, 507 U.S. at 185 (contrasting enterprise's affairs with those of defendants); *id.* at 182 n.7 (citing legislative history distinguishing commercial enterprises from their methods of operation). In other words, the case makes it crystal clear that an enterprise is an independent entity with its own structured existence. *Accord H.J.*, 492 U.S. at 242 (juxtaposing "entity[ ]" with "predicate acts").

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[18] Though *Reves* involved a legitimate enterprise, its operation and management test applies equally to associations-in-fact. *See, e.g.*, 3 L. Sand, *et al.*, *Modern Federal Jury Instructions – Criminal*, Inst. 52-25 (Matthew Bender) ("Sand") (general instruction requiring "operation or management" evidence in all § 1962(c) cases).

Third, by their very nature, the words "operate" and "manage" – not to mention "direct" and "control" – inherently signify a degree of structure.[19] After all, the *Reves* test presupposes something *to* operate and manage, along with means and methods for doing so. *See, e.g.,* Webster at 1372 ("management": the "conducting or supervising of something"). A measure of structure – for example, a protocol for taking decisions; a chain of command for communicating them; and/or differentiated role players to carry them out – fits the bill, making the test clear and comprehensible. Without structure, on the other hand, there would be nothing to manage or operate – let alone direct or control – rendering the test incoherent.

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[19] *See, e.g.,* Webster at 1581 ("operations": the "process of planning for and operating a business or other organized unit"); *id.* at 1372 ("management": the "executive function of planning, organizing, coordinating, directing, controlling and supervising any industrial or business project or activity"); American Heritage at 1091 ("management": the "person or persons who control or direct a business or other enterprise"); Webster at 640 ("direct": "to carry out the organizing, energizing, and supervising of esp. in an authoritative capacity"); *cf. id.* at 496 ("control": "application of policies and procedures for directing, regulating, and coordinating production, administration, and other business activities").

Reves itself illustrates the point, positing both a vertical "ladder of operation" – including upper managers, "lower rung participants" and other "low-level employees" under their "direction" – and horizontal control persons running the enterprise illicitly. 507 U.S. at 184 & n.9. A clearer expectation of structure would be hard to formulate. This is especially true given *Reves*'s additional observation that liability extends beyond those with "primary [supervisory] responsibility," suggesting even further stratification. *Id.* at 179; *accord Kushner*, 533 U.S. at 165 (hypothesizing "illegitimate" enterprise composed of "high-ranking individuals" and, presumably, their subordinates).

For all these reasons, a structure requirement is implicit in *Reves* as well as *Turkette*, perfectly complementing the operation and management test. *Cf. Riccobene*, 709 F.2d at 222 (structure entails a "mechanism for controlling and directing" group affairs on ongoing rather than *ad hoc* basis).[20]

2. *H.J.*: Relation, Continuity, Circularity and Federalism

A structure requirement is also implicit in *H.J.*, where the Court held that predicate acts must be related and continuous to form a RICO pattern. 492 U.S. at 237, 239. The continuity prong recalls *Turkette*'s "continuing unit" language, which intrinsically connotes structure. *See supra* 28-29. Accordingly, a structured enterprise also dovetails with – but does not duplicate – *H.J.*'s pattern definition.[21]

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[20] While conceptually overlapping *Reves*, a structure requirement is neither redundant nor superfluous, as the tests address entirely different statutory elements: collective enterprise vs. personal participation. *Cf. supra* n.17.

More significantly, *H.J.* went on to note that continuity may be found where the predicate acts are part of a "long-term [criminal] association," 492 U.S. at 242-43. In other words, a RICO pattern, or at least its continuity aspect, may be inferred from proof of an illicit RICO enterprise. This proposition confirms that an enterprise is something different – something more concrete and substantial – than its predicate acts alone. Were it not, there would be nothing other than the predicate acts from which to infer the pattern, reducing the proposition to a tautology: proof of a pattern may establish a pattern. That cannot be what *H.J.* meant.

The point is punctuated by reading *H.J.* and *Turkette* in tandem. Together, the cases allow juries to infer an enterprise from proof of a pattern, *Turkette*, 452 U.S. at 583, and a pattern from proof of an enterprise. *H.J.*, 492 U.S. at 242-43. Without a genuine organic entity to anchor it – that is, if an enterprise is just a proxy for its predicate acts – this equation dissolves into circular "gibberish." *Korando*,

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[21] Again, this is because pattern and enterprise are wholly separate statutory elements. *Ibid.*

29 F.3d at 1118. Structure is therefore crucial to give the enterprise content and meaning as a truly separate element. Indeed, the vagueness of the pattern concept itself, roundly criticized in *H.J.*,[22] only accents the need for a viable enterprise with a "plausible" existence and structure. *Cf. Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).[23]

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[22] *See* 452 U.S. at 236, 243, 249 (majority opinion); *id.*at 251-56 (opinion concurring in judgment); *accord Sedima*, 473 U.S. at 500; *Ft. Wayne Books v. Indiana*, 489 U.S. 46, 76-77 n.14 (1989) (Stevens, J., joined by Brennan and Marshall, JJ., *concurring and dissenting*) (noting that pattern requirement has been likened to Justice Stewart's famous obscenity test in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion): "I know it when I see it.") (additional citations and quotation marks omitted).

[23] Relatedly, an enduring structural apparatus works together with the pattern's continuity component to promote RICO's overriding goal of deterring "long-term criminal conduct." *H.J.*, 492 U.S. at 242. Congress enacted RICO as a modest departure from traditional federalism principles to wage a national "war against organized crime." *Turkette*, 452 U.S. at 586. Extending the statute to fleeting, unstructured alliances of petty criminals divorces it from this narrow rationale for slightly altering the state-federal law enforcement balance. It tacks too close to a national police power, *cf. United States v. Lopez*, 514 U.S. 549 (1995), federalizing "much ordinary criminal behavior, ranging from simple assault to murder, ... that typically is the subject of state ... prosecution." *Scheidler v. Nat'l Org. For Women, Inc.*, 547 U.S. 9, 20 (2006) ("*Scheidler III*"); *cf. Anza*, 547 U.S. at 472 (Thomas, J., *concurring and dissenting*) (RICO not intended to "remedy general state-law criminal violations"); *Sedima*, 473 U.S. at 503 (Marshall, J., joined by Brennan, Blackmun and Powell, JJ., *dissenting*) (broadly interpreting RICO's criminal provisions

(continued...)

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In sum, an ascertainable structure requirement is harmonious with – if not implicit in or dictated by – this Court's interpretation of RICO's core elements in *Turkette*, *Reves*, *H.J.*, *Kushner*, *Scheidler I* and *Salinas*. Because it also aligns with the statutory text and framework, as indicated above and elaborated below, the Court should adopt the requirement as a formal holding.

II. RICO'S WORDS AND STRUCTURE – INTERPRETED UNDER CONVENTIONAL CONSTRUCTION CANONS AND IN THE BROADER CONTEXT OF OCCA AND VICAR – MANDATE AN ASCERTAINABLE STRUCTURE REQUIREMENT

Analyzing RICO's language and framework under standard canons of statutory construction –

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[23](...continued)
reverses presumption that states primarily responsible for enforcing state law) (citation and quotation omitted).

On the other hand, a continuing structure requirement respects Congress's delicate policy balance while curbing RICO's more extravagant civil applications, in which phantom enterprises abound. *See H.J.*, 492 U.S. at 255 (Scalia, J., joined by Kennedy and O'Connor, JJ., and Rehnquist, C.J., *concurring in judgment*) (lamenting RICO's "federalization of broad areas of state common law") (citation and internal quotes omitted); Alito Article at 12 (describing civil RICO suits "arising out of landlord-tenant and real estate disputes, employment grievances, and even divorce fights"); *cf. Bridge*, 128 S. Ct. at 2145.

independently, as part of the larger OCCA and in light of the corresponding VICAR law – verifies that they require a discernibly structured enterprise.

A. STRUCTURE IS APPARENT IN THE PERTINENT STATUTORY TITLES

To begin, structure is evident in RICO's considered statutory title: *Racketeer* Influenced and Corrupt *Organizations* Act. *See, e.g., United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804) (Marshall, C.J.) (title generally relevant in statutory construction); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (same); *Sedima*, 473 U.S. at 524 (Powell, J., *dissenting*) (referencing RICO's title in exploring its intended reach); Blakey & Gettings at 1025 n.91 (stressing title's importance in interpreting RICO); Blakey at 258 n.59 (title reflects RICO's full and "final scope"); *Bagaric*, 706 F.2d at 57 n.13 (relying on statutory title in construing RICO).

As previously explained, the word "organization" is synonymous with "structure." And according to Prof. Blakey, RICO's architect, "racket" and "racketeer" connote a "business" or its operation, naturally entailing a businesslike structure. *See* Blakey at 250 n.41 ("A business that obtains money through fraud or extortion"; "One engaged in an illegal business"; "the operation of an illegal business as well as ... a legal [one]") (citations and internal quotes omitted).

Similarly, the word "Organized" in OCCA's title was "directed at criminal activity carried out by large organizations, described by Congress as hierarchical in structure and as having their own system of law and independent enforcement institutions." *Iannelli v. United States*, 420 U.S. 770, 794 (1975) (Douglas, J., joined by Stewart and Marshall, JJ., *dissenting*) (footnote omitted).

Thus, in their "normal usage,"[24] "ordinary meaning"[25] and "common understanding,"[26] RICO's and OCCA's titular words strongly suggest some kind of structure, businesslike or otherwise.

B. A STRUCTURED ENTERPRISE REQUIREMENT GIVES EFFECT TO ALL OF § 1962(c)'S TERMS AND RENDERS NONE SUPERFLUOUS

As discussed in our Overview, conflating an enterprise with its predicate crimes effectively

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[24] *See H.J.*, 492 U.S. at 238, 241.

[25] *Richards v. United States*, 369 U.S. 1, 9 (1962).

[26] *Reves*, 507 U.S. at 179.

"eliminate[s]"[27] the enterprise in illicit association cases, because "any pattern of racketeering virtually requires some association-in-fact for its commission," Vitter at 1427 (footnote and citations omitted). Accordingly, the minority view not only contravenes *Turkette*'s clear admonition – the enterprise "at all times remains a separate element which must be proved," 452 U.S. at 583 – but reduces the word to pure "surplusage." *Beck v. Prupis*, 529 U.S. 494, 506 (2000).

In so doing, the minority view upends the "longstanding canon" that shuns "meaningless" constructions, *id.*, and eschews "linguistic superfluity." *Scheidler III*, 547 U.S. at 21. *See, e.g., Chang*, 80 F.3d at 1298 ("every pattern of racketeering activity becomes an enterprise") (citation and internal quotes omitted). Conversely, a structure requirement faithfully applies the canon by giving the enterprise "effect" as a separate statutory element. *Scheidler III*, 547 U.S. at 21; *see, e.g., Bledsoe*, 674 F.2d at 663 (giving effect to all statutory words requires "association with an enterprise ... distinct from participation in the conduct of the enterprise through a pattern of racketeering").

C. A STRUCTURED ENTERPRISE REQUIREMENT CONFORMS WITH § 1961(4)'S SURROUNDING TEXT

"Statutory language must be read in context since a phrase gathers meaning from the words around it." *Genl. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 582 (2004) (citations, internal quotes and alterations omitted). Section 1961(4) defines an enterprise to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." As Judge Posner recently explained, the second clause – "juxtaposi[ng]" the phrase "associated in fact" with "although not a legal entity" – suggests that an associative enterprise "just means structured without the aid of legally defined structural forms such as the business corporation." *Limestone*, 520 F.3d at 804-05.[28] This conclusion is buttressed by the conjunction "although," which, in context, implies something approaching or resembling, but not amounting to, a "legal entity." *See* American Heritage at 55 (defining "although" as "even though"); Webster at 63 ("even if").

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[27] *Sedima*, 473 U.S. at 498.

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[28] The minority courts' main objection to a structure requirement, that "criminal enterprises 'may not observe the niceties of legitimate organizational structures,'" *Odom*, 486 F.3d at 551 (quoting *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001)), overlooks *Turkette*'s observation that enterprise organization may be "formal or informal," 452 U.S. at 583. Judge Posner's analysis, properly reflecting that observation, firmly refutes the objection. As many courts thus recognize, structure is not "inconsistent with the existence of enterprises that pursue entirely illicit goals," Second Lynch Article at 974 – or, for that matter, licit and illicit ones. *See, e.g.*, *Lemm*, 680 F.2d at 1201 (evidence showed "ongoing structure" engaged in "legitimate purchases and repairs as well as acts of arson"); *Rogers*, 89 F.3d at 1337 (structure does not require proof that group "engages in some other legitimate activity"); *Torres*, 191 F.3d at 806 (continuity of *informal* enterprise and role differentiation can supply requisite structure).

Judge Posner's interpretation finds additional support in the word "union," which immediately precedes "group of individuals associated in fact" in the second clause. As used in § 1961(4), "union" means labor union[29] – a quintessentially structured entity. ***See, e.g., Burdett***, 957 F.2d at 1379 (statute aimed at "labor unions"); Rakoff & Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 1.05[6] at 1-67 (2001 ed.) ("Labor unions are expressly included within the definition of an 'enterprise'"); Ninth Cir. PJI 8.129 (equating "union" with "commercial enterprise"); *id.*, Comment (equating "union" with, *inter alia*, "partnership" and "corporation") (citation and internal quotes omitted); CA 10 Cmt. (conjoining "unions and their benefit funds" and equating them with, *inter alia*, partnerships, corporations and government entities).

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[29] Since labor unions were not considered legal entities at common law and their legal status was uncertain at RICO's passage, Congress seems to have included them in the second, informal entity clause in an excess of caution, to ensure their coverage. *See, e.g., Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 617 (6th Cir. 2004) (unions generally not recognized as permissible litigants or legal entities at common law) (citing *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510 (1962); *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 454 (1957)); *Bridge*, 128 S. Ct. at 2139 (Congress legislates against backdrop of common law presumptions); *United Steelworkers of Am. v. R.H. Bouligny, Inc.*, 382 U.S. 145 (1965) (holding unincorporated labor union not a citizen for purposes of diversity jurisdiction).

Indeed, reading "union" as a common noun rather than a proper one – that is, an "alliance or confederation of people,"[30] a "consolidated body or group"[31] or "a confederation or league of independent individuals"[32] – would make it redundant of the succeeding phrase "group of individuals," confounding the anti-nullification canon. *See Beck*, 529 at 506; *cf.* 18 U.S.C. § 1961(1)(C) (listing violations of 29 U.S.C. §§ 186, involving corrupt payments to "labor organizations," and 501(c), concerning "embezzlement from union funds," as RICO predicate acts).

Thus viewed, union ineluctably means a *structured* labor union, underscoring that the adjacent phrase "associated in fact" also signals some kind of structure. *See, e.g.,* 115 Cong. Rec. 5,874-75 (1969) (Sen. McClellan) ("Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate [labor] unions."); Pub. L. 91-452 § 1, 84 Stat. 922-23 (1970) (Congressional Statement of Findings and Purposes) ("Findings Statement") (organized crime

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[30] American Heritage at 1952.

[31] Webster at 2499.

[32] *Ibid.*

"infiltrate[s] and corrupt[s] "legitimate business and labor unions").[33]

Finally, as Judge Posner soundly concluded, the textual "inference" that an associational enterprise requires some structure – though not necessarily a legally defined one – "is reinforced by the fact that before 'any union or group of individuals associated in fact' ... appears a list of [formally structured] legal entities," *Limestone*, 520 F.3d at 805: specifically, partnerships, corporations, associations, etc. *Cf.* *Turkette*, 452 U.S. at 581-82.

D. THE COROLLARY VICAR STATUTE SHOWS THAT STRUCTURE IS INTRINSIC TO A RICO ENTERPRISE

Passed in 1984 to "complement" RICO,[34] 18 U.S.C. § 1959 punishes the commission of violent crimes for anything of pecuniary value from, or to enter, maintain or increase position in, "an enterprise engaged in racketeering activity." The "enterprise" definition is substantially "the same" as RICO's, *Rogers*, 89 F.3d at 1335 – including a "group of individuals associated in fact" – and is meant to have the "same meaning," 3 Sand 52-72, and "scope." *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994) (citing legislative history) (internal quotes omitted). *See, e.g.*, Dept. of Justice U.S. Attorney's Manual, § 9-110.812(C) (1997) ("USAM") (definitions are "closely related"); *Rogers*, 89 F.3d at 1335 (drawing on RICO cases in construing § 1959 "enterprise"); 3 Sand at 52-72 ("all" RICO enterprise precedent "is applicable to section 1959") (footnote omitted).

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[33] Even as a common noun, "union" still evokes something structured. *See* Webster at 2499 ("a uniting (as of groups, factions, people) into a coherent and usu. harmonious whole").

[34] *See, e.g.*, *United States v. Mapp*, 170 F.3d 328, 335 (2d Cir. 1999); *Rogers*, 89 F.3d at 1335.

By VICAR's plain terms, an enterprise is something into which one gains entry, and in which one holds, maintains and increases position. It is something that has interests, and is capable of paying outsiders – independent contractors, as it were – to promote them. *See, e.g., United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992); 3 Sand at 52-78. And it is something capable of enforcing internal "discipline," *id.* Inst. 52-41, and imposing obligations and responsibilities "as an integral aspect of membership," *Fiel*, 35 F.3d at 1004 (quoting legislative history) (internal quotation marks omitted).

What do these characteristics suggest if not a structured entity? A RICO enterprise should not be construed any differently. Even the government concedes that VICAR "incorporates RICO concepts and terms, namely 'enterprise' and 'racketeering activity,' and there is a need to maintain consistent applications and interpretations" of RICO's "elements." USAM § 9-110.802; *see also id.* § 9-110.815 (stressing VICAR's "similarity to RICO"). Accordingly, the government says it will not prosecute § 1959 cases "unless the **enterprise has an ascertainable structure ... apart from the racketeering activity** and crimes of violence it is engaged in, and otherwise meets the standards for a RICO prosecution." *Id.* § 9-110.812(C) (emphasis supplied). This is compelling evidence for Boyle's position. *Cf. Scheidler III*, 547 U.S. at 21 (relying on subsequent Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a)(3), in parsing earlier Hobbs Act, 18 U.S.C. § 1951).

E. RICO AND OCCA SCRUPULOUSLY DISTINGUISH ENTERPRISE AND CONSPIRACY

RICO conspiracy and predicate conspiracy are "distinct offenses with entirely different objectives." *United States v. Pungitore*, 910 F.2d 1084, 1135 (3d Cir. 1990). As the Third Circuit explained:

> The object[] of a RICO conspiracy is to assist the enterprise's involvement in corrupt endeavors, whereas the object[] of [a] predicate conspiracy is confined to the commission of a particular substantive offense. Because of this distinction, a person may join a predicate conspiracy and agree to commit a substantive offense but not be a RICO conspirator and not commit a substantive RICO offense.

United States v. Irizarry, 341 F.3d 273, 293 n.7 (3d Cir. 2003) (citations, internal quotes and alterations omitted); *accord Salinas*, 522 U.S. at 477-78 (conspirator must "adopt" and "intend to further" goal of facilitating a "criminal endeavor").

As demonstrated in our **Overview**, the minority approach blurs "this distinction"[35] by merging an enterprise with its pattern of predicate crimes – conspiracy and substantive – imposing blanket RICO liability merely for committing or agreeing to commit racketeering acts. It thereby reduces RICO to a glorified proscription of multi-object conspiracies extending over time,[36] offering automatic sentence jumps in all § 371 cases, *cf. Santos*, 128 S. Ct. at 2026-27 (plurality opinion) – including Boyle's given his overarching bank burglary conspiracy conviction. *See supra* 20.

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[35] *Irizarry*, 341 F.3d at 293 n.7.

[36] *See, e.g.*, U.S.S.G. § 1B1.4; Second Lynch Article at 946 & n.123 ("a single conspiracy can include among its objects the commission of several crimes – either multiple violations of the same statute or violations of several statutes") (citing *Braverman v. United States*, 317 U.S. 49, 53 (1942)); *cf. Iannelli*, 420 U.S. at 796 (dissenting opinion) (enterprise invariably involves "repeated transactions").

This approach defies common sense, as it would "RICO-ize vast amounts of conspiracy law"[37] and Congress could have achieved the same result simply by amending § 371 to hike its penalties and/or strike its overt act requirement. *See, e.g.,* Second Lynch Article at 942 n.107 ("If penalties for certain offenses are insufficient, they should be raised."). But Congress consciously chose a different route, hunting bigger game than journeymen conspirators: coordinated, resourceful, relatively sophisticated *structures* and the greater threat they pose. *See, e.g.,* Vitter at 1427-30, 1443-44.

Fortifying that conclusion are RICO's and OCCA's statutory text and structure, which studiously distinguish an "enterprise," on the one hand, from a "conspiracy" and its counterparts on the other. *Compare, e.g.,* 18 U.S.C. § 1962(c) (prohibiting unlawful conduct of "enterprise") *with id.* § 1962(d) (prohibiting "conspir[acies]" to violate §§ 1962(a)-(c)) *and id.* § 1963(f) (forfeiture provisions addressing persons "acting in concert" with defendant) *and id.* § 3575(e)(3) (recidivist enhancements for prior felonies committed in furtherance of "conspiracy" defendant supervised) (repealed)[38] *and id.* § 1511(a)(1) (punishing

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[37] Oral Argument Tr. in *Mohawk Inds., Inc. v. Williams,* No. 05-465, 2006 WL 1194498, at *45 (April 26, 2006) ("*Mohawk* Tr.") (Breyer, J.).

[38] This Court has acknowledged that § 3575 "may be useful (continued...)

"conspiracy" to corrupt government officials to facilitate illegal gambling business).

Where, as here, Congress "includes particular language in one section of a statute but omits it in another," it generally acts "intentionally and purposely," and this Court "refrains from concluding" that "differing language in ... two subsections has the same meaning in each." *Russello*, 464 U.S. at 23 (citation and internal quotes omitted). In view of these bedrock presumptions, and given their disparate uses throughout RICO and OCCA, enterprise and conspiracy surely mean, and are, different things – despite the minority courts' blending them into one. *See Turkette*, 452 U.S. at 580 ("internal inconsistencies" are to be avoided in statutory construction) (citations omitted). Indeed, this Court has long appreciated Congress's "clear awareness of the distinct nature of a conspiracy" and its objects in OCCA, intending them as "independent curb[s]" in an integrated organized crime

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[38](...continued)
in interpreting other [OCCA] sections." *Cf. Sedima*, 473 U.S. at 496-97 n.14; *H.J.*, 492 U.S. at 239-40. In that light, § 3575(e)(3)'s use of conspiracy rather than enterprise is especially telling, as a model for that provision originally used the enterprise-like phrase "continuing illegal business" instead. *See* First Lynch Article at 671 n.48 (citations and internal quotes omitted). The switch corroborates that conspiracy and enterprise are distinct concepts. *Cf. Russello*, 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.") (citations omitted).

"strategy." *Iannelli*, 420 U.S. at 788-90 (citation and internal quotes omitted).

The minority position scuttles this "careful[]" dichotomy, *id.* at 789, by reducing a § 1962(c) enterprise to a "simple copy"[39] of a § 1962(d) conspiracy – already broader and "more comprehensive" than § 371, *Salinas*, 522 U.S. at 63-64 – rendering either provision nugatory. Again, that flouts both the anti-nullification canon and *Salinas*'s own reaffirmation that racketeering – here, conducting an associative enterprise illegally – and racketeering conspiracy are "two [separate] crimes" whose "fact[s]" may converge. 522 U.S. at 65-66 (juxtaposing "enterprise" with "conspiracy to further it"); *accord Iannelli*, 420 U.S. at 788 n.21 (juxtaposing "enterprise" with "conspiracy") (citing legislative history). And, if anything, the practical difficulty in "determining just where the enterprise ends and the conspiracy begins," *Salinas*, 522 U.S. at 65, makes a structure requirement even more imperative, so judges and juries can meaningfully distinguish them.

Without such a requirement, on the other hand, RICO would swallow if not negate 18 U.S.C. § 1955, OCCA's Title VIII. That provision imposes a five-year sentence on defendants who run illegal gambling businesses – those operating for over 30 days or grossing $2000 in any one day – involving five or more persons who "conduct, finance, manage, supervise, direct, or own" them. Section 1955 violations are designated RICO predicate acts. *See* 18 U.S.C. § 1961(1). Thus, absent a structured enterprise requirement, prosecutors could evade § 1955's five-or-more-managers threshold – and actually obtain a stiffer, 20-year sentence – simply by charging two months or even two lucrative days of group gambling as a § 1962(c) offense. All joint gambling infractions threatening any continuity would thereby become *per se* RICO violations, making § 1955 an utterly futile exercise. To avoid that anomaly, an associative RICO enterprise must have a perceptible structure at least approximating that of a § 1955 "illegal gambling business." *Cf.* Kiffel at 117-18 & nn.108-09 and authorities cited.[40]

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[39] *Anza*, 547 U.S. at 486 (Breyer, J., *concurring and dissenting*).

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[40] Granted, Congress knows how to impose an express structure requirement when it wants to. *See, e.g.*, 21 U.S.C. § 848(c)(2)(A); 18 U.S.C. § 521; 18 U.S.C. § 1955(a)-(b); *cf.* 18 U.S.C. § 1952(b). But those enterprises or enterprise-like entities involve particular kinds of illegal activity – *viz.*, drugs (§ 848), drugs and violence (§ 521), gambling (§ 1955) – so Congress could define them narrowly and precisely. By contrast, RICO was designed to accommodate enterprises of every conceivable stripe – legal, illegal and otherwise, *see Turkette*, 452 U.S. 576 – so Congress had to paint more broadly. It does not follow, however, that such enterprises may be entirely without structure. As *Turkette* itself indicates, the shoe is on the other foot. *Cf. Russello*, 464 U.S. at 24-25 (rejecting proposed analogy to Continuing Criminal Enterprise (CCE) statute, though "passed by the same Congress in the same month" as RICO, because "Language in one statute

(continued...)

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In sum, a structured enterprise requirement is manifest in the titles, terms, context and framework of RICO, OCCA and VICAR, interpreted under cardinal construction canons. *See Scheidler I*, 510 U.S. at 260 (suggesting that appropriate "requirement[s]" may be "fairly implied" in RICO's and OCCA's "operative sections").

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[40](...continued)
usually sheds little light upon the meaning of different language in another ..., even when the two are enacted at or about the same time.").

III. AN ASCERTAINABLE STRUCTURE REQUIREMENT COMPORTS WITH RICO'S STATUTORY PURPOSE AND LEGISLATIVE HISTORY

As this Court[41] and the government[42] have repeatedly recognized, RICO was passed primarily, though not exclusively, to combat organized crime and its infiltration of business, labor unions and government – structured entities all. *See, e.g.*, Findings Statement (statute "seek[s] the eradication of organized crime in the United States"); 115 Cong. Rec. 5,872 (1969) (Sen. McClellan) (Mafia confederation

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[41] *See, e.g., H.J.*, 492 U.S. at 245 ("Organized crime was without a doubt Congress' major target"); *Russello*, 464 U.S. at 26 (legislative history "clearly demonstrates" that RICO intended to "provide new weapons of unprecedented scope for an assault upon organized crime"); *Turkette*, 452 U.S. at 591 ("major purpose" was to "address the infiltration of legitimate business by organized crime").

[42] *See, e.g., Reves*, 507 U.S. at 185 (government conceding that "RICO's major purpose was to attack the infiltration of organized crime and racketeering into legitimate organizations") (citation and internal quotes omitted); Govt. *Amicus* Br. Supporting Respondents in *Mohawk*, 2006 WL 680358, at *10 n.2 (March 16, 2006) (§ 1961(4)'s "express inclusion of associated-in-fact enterprises may reflect Congress's effort to ensure that organized-crime syndicates are treated as covered 'enterprises'"); *Mohawk* Tr. at *45 ("Congress added a specific reference to groups of individuals [because] they were thinking in terms of mob families or syndicates.... [T]hey wanted to make sure those were covered").

"epitomizes," if not "exhaust[s]," organized crime concept). Requiring some discernibly structured enterprise – if not the full-blown coordination, integration and multi-dimensionality that commanded Congress's attention[43] – thus advances the statutory goal without restricting its intended scope. *See, e.g.*, 115 Cong. Rec. 9,567 (1969) (Sen. McClellan) (calling for a "frontal assault" on "the bastions of organized crime"); 116 Cong. Rec. 35,309 (1970) (Rep. Minshall) ("expertly organized, highly sophisticated criminal syndicates have bled our citizens").

While admittedly not so constrained,[44] RICO was "plainly enacted ... to address the problem of organized crime." *Anza*, 547 U.S. at 471 (Thomas, J., *dissenting*); *see also id.* at 473-74 (Congress, Court and Presidential Commission agree that RICO chiefly concerned with "protect[ing] businesses against competitive injury from organized crime"). The statute touches others only "incidental[ly,]" 116 Cong. Rec. 18,914 (1970) (Sen. McClellan), or "inadvertently,"[45] to ensure coverage of organized crime in all its variety and quell constitutional concerns about creating a status crime, *see Sedima,* 473 U.S. at 525 (Powell, J., *dissenting*)

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[43] *See* Alito Article at 3 ("great bulk" of congressional debate "focused narrowly on the Mafia and, specifically, mafia infiltration of legitimate business").

[44] *See, e.g., H.J.*, 492 U.S. at 248.

[45] *Ibid.* at 479.

(citing 116 Cong. Rec. 35,343-44 (1970) (Rep. Celler); *id.* at 35,344 (Rep. Poff)).

In fact, the "enterprise" element was intended as a "critical limitation," *Reves*, 507 U.S. at 183, to focus RICO specifically on "traditional organized crime and comparable ongoing criminal activities carried out in a structured, organized environment," *Sedima*, 473 U.S. at 526 (Powell, J., *dissenting*) (citation omitted) (emphasis supplied). As Sen. McClellan himself flatly put it, RICO rests on the "judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest." 115 Cong. Rec. 9,568 (1969); *accord* 116 Cong. Rec. 18,940 (1970) (Sen. McClellan) (no RICO liability unless defendant uses "pattern to obtain or operate an interest in an interstate business").

In particular, Congress aimed the Act at coordinated criminal penetration and corrupt operation of structured "organizations," 115 Cong. Rec. 9,567 (1969) (Sen. McClellan), like businesses and labor unions. *See, e.g.*, 115 Cong. Rec. 6,992-93 (1969) (Sen. Hruska) (legislation "seeks to strengthen the defense of legitimate business against takeover by organized crime"); 116 Cong. Rec. 591 (1970) (Sen. McClellan)

("Labor unions are infiltrated, and then labor peace is sold to businesses.").[46]

That these classic structured entities – criminal syndicates,[47] businesses, labor unions and government agencies[48] – dominated congressional debate suggests a solid expectation that all RICO enterprises, § 1962(c) associational enterprises and otherwise, would have at least some degree of structure. This is particularly true in the absence of any significant legislative history to the contrary.

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[46] Two stray snippets in the legislative history state that "enterprise" was defined to include "associations in fact[] as well as legally recognized associative entities. Thus, infiltration of any associative group by any individual or group capable of holding a property interest can be reached." S. Rep. No. 91-617, at 158 (1969); H.R. Rep. No. 91-1549, at 56 (1970) (same). The phrase "any associative group" plainly refers to that which is infiltrated, not to an enterprise that is operated criminally in the first instance – the paradigmatic association-in-fact and the kind alleged here. And, far from suggesting that such illicit enterprises need no structure, the expectation that they can hold "property interest[s]" implies just the opposite.

[47] *See, e.g.*, 115 Cong. Rec. 5,872 (1969) (Sen. McClellan) (referencing mafia families' "hierarchical **structure**") (emphasis supplied); *id.* (stressing "unique strength of La Cosa Nostra's familylike **structure**") (emphasis supplied); *id.* at 5,876-77 (Sen. McClellan) (describing "inner working[s]" of organized crime's "'family' **structure**") (emphasis supplied); 116 Cong. Rec. 585-86 (1970) (Sen. McClellan) (discussing organized crime's "internal **structure**") (emphasis supplied).

[48] *See, e.g.*, Findings Statement (organized crime has "subvert[ed] and corrupt[ed] our democratic processes").

Indeed, operational structure is the linchpin that distinguishes coordinated criminality from average conspiracy, fueling the potent social threat that spurred RICO's passage. 115 Cong. Rec. 5,876 (1969) (Sen. McClellan) (Mafia is "the 'cement'" for organized crime's "national **structure**") (emphasis supplied); 116 Cong. Rec. 601 (1970) (Sen. Hruska) (organized crime "involves thousands of criminals, working within **structures** as complex as ... any large corporation") (emphasis supplied). After all, it is structure that heightens these enterprises' danger, helping leaders escape justice and sustaining the organization when they are incapacitated. *See, e.g.*, 113 Cong. Rec. 17,950 (1967) (Rep. McClory) ("business racketeers" and "criminal cartels" employ "staffs of attorneys, accountants, and business consultants" to thwart prosecution); 116 Cong. Rec. 586 (1970) (Sen. McClellan) (Mafia's "leadership structure" fosters acquittals and dismissals); Cressey, *The Functions & Structure of Criminal Syndicates, Task Force Report: the President's Comm'n on Law Enforcement & Admin. of Justice*, 25, 57 (1967) ("directors of **criminal business organizations**" remain "immune from arrest, prosecution, and imprisonment") (emphasis supplied)[49]; 116 Cong. Rec. 607 (1970) (Sen. Byrd) (convictions simply remove syndicate leaders without "demolish[ing] the **structure** of the[ir] surviving organizations") (emphasis supplied).

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[49] As Prof. Blakey himself has acknowledged, Prof. Cressey's "Structure" paper was instrumental in developing the statute's key "enterprise criminality" concept. *See* Blakey at 253 n.46.

For all these reasons, an ascertainable structure requirement squares with RICO's legislative history while maintaining its expansive reach.[50]

IV. A STRUCTURE REQUIREMENT MESHES WITH COMMON RICO PRACTICE AND WILL NOT HINDER THE STATUTE'S ENFORCEMENT

By redefining many diffuse offenses as a single crime through the enterprise vehicle, RICO hands the government a wealth of evidentiary and procedural advantages; implicit in each – and in other essentials of daily RICO practice – is a structured enterprise.

First, RICO's "unit of prosecution" for double jeopardy purposes is the pattern of racketeering ***plus*** the enterprise, *see, e.g., United States v. Russotti*, 717 F.2d 27, 32-33 (2d Cir. 1983), highlighting the enterprise's importance as a separate structural element. Otherwise (*i.e.*, were enterprise and pattern functionally synonymous), a defendant could not identify the enterprise's basic parameters, and the government could repeatedly prosecute him for conducting the same supposed enterprise without his even knowing it – much less eliciting a jeopardy objection. That, in turn, would vitiate both jeopardy protection generally and the pattern plus enterprise test specifically, rendering them purely illusory.

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[50] Congress reiterated RICO's structural focus as recently as 1996, adding immigration-related predicate acts to target "**organized** smuggling gangs." 139 Cong. Rec. 9,923 (1993) (Sen. Simpson) (emphasis supplied).

Second, the government routinely introduces, and courts regularly approve, expert testimony concerning the "operation [and] **structure**" of the alleged enterprise, *United States v. Locascio*, 6 F.3d 924, 936-37 (2d Cir. 1993) (emphasis supplied). This is a tacit recognition that structure is an enterprise staple. *See, e.g., United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988) (such testimony "assist[s]" the jury). Otherwise the testimony would be irrelevant and inadmissible, as it raises thorny hearsay, confrontation and bolstering issues. *See Mejia*, 2008 WL 4459289, at *6-*17.

Third, to establish "the history, **structure** and internal discipline of the [alleged] enterprise," *United States v. Eufrasio*, 935 F.2d 553, 573 (3d Cir. 1991) (emphasis supplied), the government is typically allowed to present evidence of uncharged crimes, even when they are "unsavory" and relate to individuals other than the defendant. *Johnson*, 440 F.3d at 840-41. This so-called "enterprise proof," often severely prejudicial, skirts the strictures of Fed. R. Evid. 404(b). *See Old Chief v. United States*, 519 U.S. 172, 180-82

(1997). Boyle's case is illustrative, as the government offered "uncharged crimes and other acts ... as direct proof of the **structure** and organization of the [putative] racketeering enterprise." Govt. *in limine* motion, Feb. 15, 2005, at 1 (emphasis supplied). If there is no structured enterprise requirement, why should juries be permitted to consider murders and other violent crimes[51] by non-defendants that would otherwise be excluded under Rule 404(b)? The very notion of "enterprise proof" thus assumes that structure is vital to a RICO enterprise. Indeed, proving that structure is the ostensible point of the exercise, as juries are frequently told in limiting instructions, *cf. Mejia*, 2008 WL 4459289, at *9 (collecting cases).

Fourth, courts and juries infer the existence of other RICO elements from evidence of the enterprise, reaffirming that the enterprise is separate and distinct. Both the continuity (*see supra* 35-36) and the relatedness needed to "show a RICO pattern may be proven through the nature of the RICO enterprise." *See, e.g., United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) (*en banc*). Similarly, the requisite "connection" between pattern and enterprise may be found where the defendant's "position" in the enterprise "facilitate[s]" or enables the predicate acts' commission. *See, e.g.,* 3 Sand Inst. 52-25. These propositions make no sense without an enterprise transcending the pattern; structure ensures one. Conversely, if pattern and nexus may be inferred from the enterprise, but the enterprise is nothing more than the pattern, settled authority becomes unintelligible. *See supra* 35-36.

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[51] To be clear, there was no evidence of that nature in this case.

Fifth, a RICO charge "provides substantial leeway to prosecutors," *Eufrasio*, 935 F.2d at 567, "loosening the statutory requirements for what constitutes joint criminal activity" and "limit[ing] the force" of ordinary joinder rules. *United States v. Castellano*, 610 F.Supp. 1359, 1396 (S.D.N.Y. 1985). The mere allegation of a common RICO enterprise allows joinder of otherwise unrelated crimes, *Eufrasio*, 935 F.2d at 567, defendants, *United States v. Krout*, 66 F.3d 1420, 1429 (5th Cir. 1995), and even "agreements" that would otherwise constitute "multiple [separate] conspiracies," *United States v. Maloney*, 71 F.3d 645, 664 (7th Cir. 1995). *A fortiori*, an enterprise must be something different and larger – something more tangible and structured – than a mere aggregation of those crimes, defendants and conspiracies. Through the enterprise "umbrella," RICO "ties together" highly "diversified acts" in a single, "multifaceted" prosecution. *Eufrasio*, 935 F.2d at 566; *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978).

Sixth, and finally, RICO allows the government to revive otherwise stale crimes – often decades old and long since time-barred – by charging them as predicate acts along with just one other recent act. *See, e.g.*, *United States v. Wong*, 40 F.3d 1347, 1367 (2d Cir. 1994). A structured enterprise is the engine that drives this circumvention, if not indefinite extension, of the limitations period. *Cf., e.g.,* Second Lynch Article at 929, 940, 979.

In sum, the government cannot have it both ways, reaping enormous tactical benefits from enterprise structure – powerful expert testimony; damaging "enterprise proof" exceeding Rule 404(b); prejudicial joinder of defendants, charges and conspiracies; and a functionally extended statute of limitations – while denying the existence of any structure requirement. Enterprise is the hub of the government's RICO litigation strategy, and structure the conceptual glue that binds it together.[52]

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[52] Since the government is already proving enterprise structure in the bulk of cases, a structure requirement will not make RICO charges harder to prosecute – an invalid objection in any event. *See Santos*, 128 S. Ct. at 2028-29 (plurality opinion); *Richardson v. United States*, 526 U.S. 813, 823 (1999); *cf. supra* n.11 (noting prevalence of structure requirement and jury instructions without impairment of RICO's administration). If the government cannot clear this "very low hurdle," *Korando*, 29 F.3d at 1118 – that is, if it cannot establish a *bona fide* enterprise – then RICO should not be invoked because the predicate acts are independently punishable as state and/or federal crimes. *See, e.g., Burdett*, 957 F.2d at 1379 (requiring "some" structure but not "much"); *Turkette*, 452 U.S. at 578-80 (professional-type organization committing distinct crimes); *Riccobene*, 709 F.2d at 223-24 (overseeing, clearinghouse and coordination function shows "separate existence") (footnote omitted); *Tillett*, 763 F.2d at 631-32 (recurring *modus operandi*; existence between predicate acts); *Johnson*, 440 F.3d at 840 (division of labor); *Limestone*, 520 F.3d (continued...)

V. PRINCIPLES OF LENITY, CONSTITUTIONAL AVOIDANCE AND CONSTITUTIONAL DOUBT WARRANT AN ASCERTAINABLE STRUCTURE REQUIREMENT

In recent years, this Court has reemphasized a defendant's fundamental right, under the Constitution's Fifth and Sixth Amendments, to have every essential element of a criminal offense determined by a jury beyond a reasonable doubt. *See, e.g., Booker*, 543 U.S. at 230; *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-78 (2000). By its terms, 18 U.S.C. § 1962(c) makes it "unlawful" to conduct an enterprise through a pattern of racketeering activity, a felony punishable by up to 20 years in prison. *See* 18 U.S.C. § 1963(a). As such, the statute indisputably sets forth a "criminal prohibition[,]" *Bridge*, 128 S. Ct. at 2137, of which an enterprise is a "predominant," *Salinas*, 522 U.S. at 62 (citation omitted), and "essen[tial]" element. *Anza*, 547 U.S. at 457 (citation and internal quotes

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[52](...continued)
at 804 ("personnel having differentiated functions"); *see also supra* 20 (observing that Boyle was already convicted and punished for underlying bank burglary and bank burglary conspiracy offenses). Alternatively, if the government cannot prove the separately structured § 1962(c) enterprise it has charged, it can either replead the pattern and a different enterprise without jeopardy bar (*see supra* 58-59) or simply allege a § 1962(d) violation, avoiding pattern/enterprise distinctness problems altogether. *See Salinas*, 522 U.S. at 65-66.

omitted); *see Sedima*, 473 U.S. at 489 (§ 1962 "renders certain conduct 'unlawful,'" while § 1963 imposes criminal "consequences" for its violation).

A construction that fuses enterprise and pattern, effectively erasing enterprise from the statute, therefore implicates fundamental rights and raises major constitutional concerns. *See, e.g., Salinas*, 522 U.S. at 475 (statutes should be "construed to avoid constitutional questions") (citation and internal quotes omitted); *Clark v. Martinez*, 543 U.S. 371, 379 (2005) ("statutes should be interpreted to avoid constitutional doubts"). It substantially reduces the burden of proof, practically eliminating an entire element, and thus relieves the government's Fifth Amendment obligation to establish each essential element beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). And, insofar as it permits juries to infer an enterprise even if the pattern evidence does not suggest any structure,[53] the minority view effectively removes the enterprise element from the jury's consideration, offending the Sixth Amendment's jury trial guarantee. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 510 (1995).

Similarly, to the extent that (A) "associated in fact" is a cryptic locution that has riven the circuits; (B) such an enterprise is deemed materially identical to, or wholly inferable from, its pattern of predicate acts; and (C) the pattern concept itself is certifiably vague,[54] the minority approach raises significant notice problems under the Fifth Amendment's due process clause. *See, e.g., United States v. Williams,* 128 S. Ct. 1830, 1845-46 (2008) (criminal statute must fairly inform reasonable people of what it purports to proscribe, precisely enough to prevent arbitrary enforcement); *H.J.*, 492 U.S. at 255-56 (opinion concurring in judgment) ("since it has criminal applications," RICO must "possess the degree of certainty required for criminal laws" even in its "civil applications").

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[53] *Cf.* JA 111-12 ("Common sense suggests that the existence of an enterprise is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure.").

To compound the vagueness problem, patterns of racketeering are individual rather than collective – and different criminal confederates often commit markedly different crimes – so it is unclear whose pattern(s) would undergird an enterprise inference. *See, e.g.,* 3 Sand Inst. 52-23 (government must prove beyond reasonable doubt "that the **defendant** engaged in a pattern of racketeering activity") (emphasis supplied); Fifth Cir. PJI 2.78 (enterprise must be "separate and apart from the pattern of racketeering activity in which the **defendant** allegedly engaged") (emphasis supplied); *Rogers,* 89 F.3d at 1337 ("a **single individual** may engage in a pattern of racketeering activity") (emphasis supplied). Thus, to suggest that an enterprise may be completely defined by its pattern of racketeering activity is, in a very real sense, a nonsequitur.

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[54] *See supra* n.22.

Finally, to make matters worse, the pattern may sometimes reduce to a bare replica of the otherwise empty enterprise element (*see supra* 35-36, 60-61), draining the minority approach of meaning in those instances.

To avoid these doubtful constructions and the serious constitutional questions they would stir, lenity requires an enterprise structure transcending – though provable in some cases from – that attending its participants' predicate acts. *See, e.g., Santos*, 128 S. Ct. at 2025 (plurality opinion) (rule of lenity breaks statutory ties in favor of defendants subjected to "ambiguous criminal laws"); *Reves*, 507 U.S. at 184 n.8 ("lenity would also favor the narrower operation and management test") (*dictum*); *Richardson*, 526 U.S. at 819-20 (applying doctrine of constitutional doubt to require jury unanimity as to predicate violations forming CCE "series"); *Jones v. United States*, 526 U.S. 227, 239-44 (2000) (applying constitutional doubt doctrine to hold penalty-enhancing provisions of the federal carjacking statute, 18 U.S.C. § 2119, offense elements rather than sentencing factors); *Jones v. United States*, 529 U.S. 848, 857-58 (2000) (applying constitutional doubt and lenity doctrines to hold owner-occupied residence beyond federal arson statute, 18 U.S.C. § 844, avoiding potential Commerce Clause problems).

RICO's liberal construction clause, providing that the statute "shall be liberally construed to effectuate its remedial purposes,"[55] does not alter this conclusion. This would not be the first time the Court rejected an unbridled view of RICO over liberal construction objection. To the contrary, it did just that in refining the statute's other key elements – participation and pattern – in *Reves* (operation and management) and *H.J.* (relation and continuity). *See, e.g., Reves*, 507 U.S. at 186-87, 189 (Souter, J., joined by White, J., *dissenting*) (protesting that operation and management test "limit[s]" and "restrict[s]" RICO, contrary to liberal construction clause); *cf. Anza*, 547 U.S. at 463 (Thomas, J., *concurring and dissenting*) (majority opinion "limits" civil RICO "contrary to" Congress's "broad language"). *Reves* is especially striking in this regard, reading "participate" judiciously despite noting that *Russello* had called it a "term of breadth." 507 U.S. at 178 (quoting *Russello*, 464 U.S. at 21-22) (internal quotation marks and alterations omitted). That is precisely how *Russello* described "enterprise" in the very same passage.

What is more, Congress's Findings Statement contrasts RICO's "remedies" with its "penal prohibitions," declaring that the Act seeks to eradicate organized crime by "establishing new penal prohibitions" and providing "new remedies." This distinction suggests that the liberal construction clause means what it says: only the Act's "remedial" provisions, and not its criminal proscriptions, should be construed liberally. *Sedima* so implied, stating in *dicta* that the "strict-and-liberal construction principles are not mutually exclusive; § 1961 and § 1962 can be strictly construed without adopting that approach to § 1964(c). Indeed, if Congress' liberal construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." 473 U.S. at 491 n.10 (citation omitted).

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[55] Pub. L. 91-452 § 904(a), 84 Stat. 947, *see* note following 18 U.S.C. § 1961.

At least in criminal cases, then, the liberal construction clause bows to the aged canon construing penal laws strictly in defendants' favor. Any legislative effort to override that canon infringes due process, impugns the separation-of-powers and bears no weight. *See, e.g.,* Tarlow, "RICO Revisited," 17 Ga. L. Rev. 291, 309 & n.67 (1983); *United States v. Dunn*, 442 U.S. 100, 112 (1979); *United States v. Bass*, 404 U.S. 336, 348-49 (1971).

Beyond all that, this Court has underlined that the liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183-84. And as demonstrated *supra* n.23 and POINT III, "it is clear that Congress did not intend to extend RICO liability" to unstructured pockets of petty criminals. *Id.* at 184. If anything, the minority approach thus defeats, not serves, the statute's remedial purposes.

Last, any claim that RICO is purely remedial because the behavior it punishes is already criminal, *see, e.g.,* Blakey at 266-67 & n.89, is fanciful. As *Sedima* teaches, a defendant need not be convicted of any prior crime to violate RICO. Instead, § 1961 speaks of conduct "chargeable" or "indictable" under state or federal law, words connoting, at most, an *ex parte* finding of probable cause rather than an adjudication of guilt beyond a reasonable doubt. And as the statutory language plainly indicates, RICO's crux is not just committing predicate acts, but doing so "**in connection with the conduct of an *enterprise*.**" *Anza*, 547 U.S. at 457 (2006) (citation and internal quotes omitted) (emphasis supplied). Fairly read, then, § 1962(c) unequivocally creates a new federal crime.

At any rate, *Apprendi* and its progeny belie the remedy tag. Abolishing any distinction between offense elements and sentencing factors, they direct that every essential element – including enterprise – be charged in the indictment and proved to a jury beyond a reasonable doubt. Those constitutional imperatives, like the strict construction canon, surely trump a statutory liberal construction decree. And even if remedial in purpose, RICO's 20-year sentences and debilitating criminal forfeitures are overwhelmingly punitive in form and effect. *See Hudson v. United States*, 522 U.S. 93 (1997).

For all these reasons, the liberal construction clause is unavailing and this Court's time-honored interpretive guides – the tenets of lenity, constitutional avoidance and constitutional doubt – merit an ascertainable structure requirement.

VI. BOYLE'S CONVICTION SHOULD BE REVERSED

The evidence at trial was legally insufficient to establish the existence of an enterprise with an ascertainable structure. As discussed in our **Statement of the Case**, the supposed Boyle Crew was a band of "free floaters" with "no organization at all" in which "[n]obody had any type of standing." JA 45. The purported participants did not give the enterprise "a name," *United States v. White*, 116 F.3d 903, 924 (D.C. Cir. 1997), or "self-identif[y] as ... members," *Nascimento*, 491 F.3d at 33. JA 59, 86. There was no evidence of a "coherent racketeering entity," *Calcasieu*, 943 F.2d at 1462, that "existed in the intervals" between predicate acts, *Tillett*, 763 F.2d at 632, "independent of the[ ] individual crimes." *Richardson*, 167 F.3d at 625.

The government urged below that an enterprise was established because the alleged members played particular roles, used tools and communication devices, and divided proceeds. But the roles were not distinct; the participants and what they did – "who would be a lookout or who might go into the bank or who might be on the box" – varied from job to job. JA 91-92; *cf.* *Lemm*, 680 F.2d at 1999-2000 (specific individuals serving as property finder for arsons, insurance adjuster, real estate financier). The conspirators were not especially "well-equipped" or "sophisticated," *Torres*, 191 F.3d at 807, using only basic tools from "Radio Shack," JA 66, for the burglaries themselves, not to make the criminal activity safer, more profitable or more widespread. *Cf. Tillett*, 763 F.2d at 632 (racketeers bought a smuggling boat). There was no evidence that the putative enterprise had any "financial backing," *Kragness*, 830 F.2d at 857, pooled proceeds or reinvested them to purchase equipment for additional crimes, *Chang*, 80 F.3d at 1300.

Because the enterprise proof was legally insufficient, the RICO counts must be dismissed, *cf. United States v. Kozminski*, 487 U.S. 931, 953 (1988), and the remaining convictions reversed for spillover prejudice. *United States v. Tellier*, 83 F.3d 578, 582 (2d Cir. 1996). Alternatively, Boyle is entitled to a new RICO trial due to the District Court's harmfully erroneous enterprise instruction. *United States v. Hassan*, 542 F.3d 968, 987 (2d Cir. 2008). At a minimum, the case should be remanded to the Second Circuit for consideration of these issues in the first instance under the applicable ascertainable structure test. *See, e.g., Richardson*, 526 U.S. at 824.

CONCLUSION

Boyle's conviction should be reversed.

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RESPONDENT'S BRIEF

14

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In the Supreme Court of the United States

EDMUND BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order to establish the existence of an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, the government must prove the existence of an entity with an ascertainable structure apart from the pattern of racketeering activity in which its members engage.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Summary of argument 10

Argument:

Petitioner's RICO convictions should be affirmed because a RICO enterprise exists when a continuing unit of individuals, even without additional ascertainable structure, forms for the purpose of carrying out a pattern of racketeering activity 14

I. An illicit RICO enterprise need not have an ascertainable structure so long as it has an ongoing organization whose associates function as an ongoing unit 15

A. The language and structure of RICO demonstrate that an "enterprise" need not possesses an independent ascertainable structure 16

1. RICO's definition of "enterprise" contains no "ascertainable structure" qualification 16

2. A RICO "enterprise" and a "pattern of racketeering activity" are distinct concepts that do not merge 25

3. An independent "ascertainable structure" requirement is not necessary to distinguish between conspiracy and RICO offenses 34

4. An independent "ascertainable structure" requirement finds no support in this Court's *Turkette*, *Reves*, and *H.J. Inc.* decisions 38

Table of Contents—Continued: Page

5. Petitioner's textual analysis of Section 1961(4), like the title and purpose of RICO, does not support an independent "ascertainable structure" requirement 41
6. The purpose of the RICO statute does not support an independent "ascertainable structure" requirement 43
7. Petitioner's remaining contentions are without merit 46
II. The evidence established a valid RICO enterprise even if the organization lacked an independent ascertainable structure 51
Conclusion 53
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Agency Holding Corp. v. *Malley-Duff & Assocs.*, 483 U.S. 143 (1987) 29
Ali v. *Federal Bureau of Prisons*, 128 S. Ct. 831 (2008) 16
Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 47
Asa-Brandt, Inc. v. *ADM Investor Servs., Inc.*, 344 F.3d 738 (8th Cir. 2003) 32
Bridge v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008) 22, 50
Brotherhood of R.R. Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 43
CBS v. *FCC*, 453 U.S. 367 (1981) 38

Cases—Continued: Page

Callanan v. *United States*, 364 U.S. 587 (1961) 49
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 44
Exxon Mobil Corp. v. *Allapattah Serv., Inc.*, 545 U.S. 546 (2005) 44
H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) . . . . *passim*
Hoffman Plastic Compounds, Inc. v. *NLRB*, 535 U.S. 1397 (2002) 38
Iannelli v. *United States*, 420 U.S. 770 (1975) 35, 37
Limestone Dev. Corp. v. *Village of Lemont*, 520 F.3d 797 (7th Cir. 2008) 41
Muscarello v. *United States*, 524 U.S. 125 (1998) 49
National Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 16, 21, 22, 24
Odom v. *Microsoft Corp.*, 486 F.3d 541 (9th Cir.), cert. denied, 128 S. Ct. 464 (2007) 31
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 43
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989) 20
Reiter v. *Sonotone Corp.*, 442 U.S. 330 (1979) 38
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) 38, 39
Rubin v. *United States*, 449 U.S. 424 (1981) 44
Russello v. *United States*, 464 U.S. 16 (1983) 24, 48
Salinas v. *United States*, 522 U.S. 52 (1997) . . 35, 36, 37, 50
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 23, 24, 29, 50
Smith v. *United States*, 508 U.S. 223 (1993) 49

Cases—Continued: Page

United States v. *Bagaric*, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840, and 464 U.S. 917 (1983) 30

United States v. *Bledsoe*, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1982) 32, 34

United States v. *Console*, 13 F.3d 641 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994) . . 32

United States v. *Crenshaw*, 359 F.3d 977 (8th Cir. 2004) 33

United States v. *Culbert*, 435 U.S. 371 (1978) 22

United States v. *Darden*, 70 F.3d 1507 (8th Cir. 1995), cert. denied, 517 U.S. 1149 and 518 U.S. 1026 (1996) (1996) 33

United States v. *Davidson*, 122 F.3d 531 (8th Cir.), cert. denied, 522 U.S. 1034 (1997), and 523 U.S. 1033 (1998) 19, 33

United States v. *Doherty*, 867 F.2d 47 (1st Cir.), cert. denied, 492 U.S. 918 (1989) 19

United States v. *Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978) 28

United States v. *Feola*, 420 U.S. 671 (1975) 35

United States v. *Gonzales*, 520 U.S. 1 (1997) 16

United States v. *Hewes*, 729 F.2d 1302 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985) 26

United States v. *Houlihan*, 92 F.3d 1271 (1st Cir. 1996), cert. denied, 519 U.S. 1118 (1997) 40

United States v. *Keltner*, 147 F.3d 662 (8th Cir.), cert. denied, 525 U.S. 1032 (1998) 33

United States v. *Kragness*, 830 F.3d 842 (8th Cir. 1987) 31, 33

Cases—Continued: Page

United States v. *Leisure*, 844 F.2d 1347 (8th Cir. 1987), cert. denied, 488 U.S. 932, and 488 U.S. 960 (1988) 33

United States v. *Lemm*, 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) 34

United States v. *Nabors*, 45 F.3d 238 (8th Cir. 1995) 26

United States v. *Nascimento*, 491 F.3d 25 (1st Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008) 19

United States v. *Owens*, 167 F. 3d 739 (1st Cir.), cert. denied, 528 U.S. 894 (1999) 19

United States v. *Perholtz*, 842 F.2d 343 (D.C. Cir), cert. denied, 488 U.S. 821 (1988) 20, 25

United States v. *Posada-Rios*, 158 F.3d 832 (5th Cir. 1998), cert. denied, 526 U.S. 1031, 526 U.S. 1080, and 526 U.S. 1137 (1999) 40

United States v. *Qaoud*, 777 F.2d 1105 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986) 20

United States v. *Riccobene*, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983) 31

United States v. *Richardson*, 167 F.3d 621 (D.C. Cir.), cert. denied, 528 U.S. 895 (1999) 19

United States v. *Sanders*, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845 (1991) 32

United States v. *Santos*, 128 S. Ct. 2020 (2008) 37

United States v. *Smith*, 413 F.3d 1253 (10th Cir. 2005), cert. denied, 546 U.S. 1120 (2006) 26

United States v. *Starrett*, 55 F.3d 1525 (11th Cir. 1995), cert. denied, 517 U.S. 1111, and 517 U.S. 1127 (1996) 40

Cases—Continued: Page

United States v. *Tillett*, 763 F.2d 628 (4th Cir. 1985) 32
United States v. *Turkette*, 452 U.S. 576 (1981) .... *passim*
Waterman S.S. Corp. v. *United States*, 381 U.S. 252 (1965) 47

Statutes:

Omnibus Crime Control and Safe Streets Act of 1968 § 601(b), Pub. L. No. 90-351, 82 Stat. 209 45
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 21
    § 501, 84 Stat. 933 45
    § 601(a), 84 Stat. 934 (18 U.S.C. 3503(a) (2000)) 45
    § 901(a), 84 Stat. 941 43
Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 7
    18 U.S.C. 1961 7
    18 U.S.C. 1961(1) 7, 26, 29 34, 36
    18 U.S.C. 1961(1)(A) 49
    18 U.S.C. 1961(3) 46
    18 U.S.C. 1961(4) .... *passim*
    18 U.S.C. 1961(5) 7, 26
    18 U.S.C. 1962(c) .... *passim*
    18 U.S.C. 1962(d) 2, 7, 36
18 U.S.C. 371 .... 2, 7, 34, 35
18 U.S.C. 1955 .... 21, 22, 46, 48, 49
18 U.S.C. 1955(a) 21
18 U.S.C. 1955(b)(1)(ii) 12, 21
18 U.S.C. 1956 37

Statutes—Continued: Page

18 U.S.C. 1959 . . . . 46, 47, 48
18 U.S.C. 1959(a) 47
18 U.S.C. 1959(b)(2) 47
18 U.S.C. 2113(a) 2, 7
21 U.S.C. 848(c) 21

Miscellaneous:

Black's Law Dictionary (rev. 4th ed. 1968) 17
Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* (1997) 48
H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970) 46
The American Heritage Dictionary of the English Language (4th ed. 2006) 19
The Random House Dictionary of the English Language (2d ed. 1987) 19
Webster's Third New International Dictionary (1993) . . 17

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 283 Fed. Appx. 825.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2007. On February 6, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 17, 2008, and the petition was filed on April 15, 2008. The petition for a writ of certiorari was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c); conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); conspiracy to commit bank burglary, in violation of 18 U.S.C. 371; and eight counts of bank burglary or attempted bank burglary, in violation of 18 U.S.C. 2113(a). He was sentenced to 151 months of imprisonment. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-4a.

1. Petitioner was a member of a group of individuals who engaged in a series of organized, multi-jurisdictional bank thefts over ten years, using stealth and force to rob financial institutions in numerous locations including, among others, New York City, Long Island, upstate New York, New Jersey, Ohio, and Wisconsin. See, *e.g.*, J.A. 51, 56; Tr. 282-283, 366, 382-383.

Each member of the group not only had to be capable of committing the crimes but also had to be trusted. J.A. 41; Tr. 211, 664-665. The group's hub was a "social club" in Brooklyn owned by one of their own, Tommy Dono. J.A. 58, 74-75. The group, which engaged in criminal acts from 1991 through 1999, maintained a core of members throughout its existence, while recruiting new associates as needed when members were incarcerated or moved away. J.A. 51, 88-90; Tr. 663-664, 817.

a. The group's bank-theft operations primarily targeted bank night-deposit boxes. Salvatore "Fat Sal" Mangiavillano first originated the scheme of stealing from such locations, Tr. 41, 744, and he instructed the other members of the group how to carry out the thefts. J.A. 88-89; Tr. 211-212. Those thefts followed a similar pattern. After scouting for banks likely to have vulnerable and cash-rich night-deposit boxes, J.A. 34, 55-56; Tr. 305, 317-318, 339, 434, 437, typically located in retail areas, like shopping malls, J.A. 55; Tr. 343, 366-373, 439-441, the group would normally execute robberies in the early morning hours at the beginning of the week after cash deposits had accumulated over the weekend. J.A. 32, 34; Tr. 372-373.

Several members of the group participated in each theft. One associate would assume the role of "organizer" and assemble the participants for a theft or series of thefts. J.A. 72-78. Before Mangiavillano's imprisonment for bank burglary in 1996, he ordinarily assumed that role. J.A. 90-92; see Tr. 828-829. The participating members would meet to plan their operations in advance. J.A. 75-76, 83-84, 90-91. After the planning was complete, the members would assemble the tools needed to execute the plan, Tr. 666, including crowbars, hammers, screwdrivers, ratchet sets, flashlights, chains, and fishing gaffs, as well as walkie-talkies and police scanners. J.A. 33, 38, 60, 62-63, 66-67; Tr. 339, 349-350, 383.

Each member was assigned to fill a particular role in executing each plan. J.A. 32; Tr. 665. Some acted as lookouts, either in a car or on foot. J.A. 32, 36, 38, 61, 67; Tr. 359-360. The lookouts utilized scanners to monitor police radio frequencies and walkie-talkies to communicate with other group members and warn them if police were in the vicinity. J.A. 32-33, 38, 61-62, 65-68; Tr. 782. Once the lookouts had assumed their positions, two to three members of the group would drive to the bank and attempt to detach the night-deposit box by removing the screws from its face plate, prying it off the wall with a crowbar, or attaching a chain from a car to the box and pulling the box off the wall. J.A. 32-33; Tr.

299, 317-318, 334, 339, 359-360, 443-448. Once the associates had created a hole in the bank's wall by detaching the box, they would remove the deposit bags inside the bank by hand or with a fishing gaff or similar device. J.A. 37, 63; Tr. 322. The group then would split the proceeds among the participants in the burglary—sometimes evenly and sometimes with those who removed the box receiving a larger percentage in order to compensate them for the additional risk that they assumed in the operation. J.A. 64, 79; Tr. 455, 528-529. Many of the night-deposit-box thefts were quite successful, with the group netting anywhere from thousands to hundreds of thousands of dollars in each bank theft. J.A. 36-38; Tr. 282-283, 300, 305-306, 379-380, 390, 455; see J.A. 53; Tr. 474, 819.

The group also attempted bank-vault burglaries and bank robberies, though these were far less frequent than the night-deposit-box thefts. Before executing a bank-vault operation, group members conducted surveillance of the targeted bank and gathered the requisite tools such as special cutting tools, industrial-strength drills, blow torches, gas tanks, water hoses, and walkie-talkies. Tr. 769-771, 774-777. The bank-vault burglaries occurred in the early morning hours when the banks were closed. On the day of a burglary, approximately five or six members of the group would drive to the bank. See *ibid.* As with the night-deposit-box operations, certain members would act as lookouts, using walkie-talkies. Tr. 771, 777. Others would try to gain entry into the bank (often by breaking through a bank wall), and, then, from inside the bank, they would attempt to drill directly into the bank's vault. Tr. 771-772, 777-778.

b. From 1991 to 1994, the core of the group, which committed more than 30 night-deposit-box thefts, consisted of Mangiavillano, Tommy Dono, Beck Fiseku, Chris Ludwigsen, William Galloway, and Gerard Bellafiore (until Bellafiore was imprisoned for bank burglary). J.A. 35, 52-53, 88-90; Tr. 45-47, 299-302; cf. J.A. 35 (estimating 25-30 burglaries in 1991). Petitioner was initially asked to join one of the group's bank vault robberies because the group "needed extra help" on this operation and Mangiavillano knew petitioner to be a reliable car thief from prior criminal collaborations. Tr. 765-768. Petitioner accepted and, by 1994, petitioner had participated in at least two attempted bank-vault burglaries with Mangiavillano, Dono, Fiseku, and others, J.A. 86; Tr. 766-779, as well as an attempted night-deposit-box theft with Mangiavillano, Dono, and others, Tr. 779-782; J.A. 87-88.

In 1994, the group briefly expanded their operations by planning and executing a robbery of the National Westminister Bank (NatWest) in Brooklyn. Mangiavillano, Fiseku, Ludwigsen, and petitioner were equal partners in the venture. Tr. 85, 92, 167-170. The participants played the various roles of driver, lookout, and robbers, and they obtained approximately $900,000 from the bank heist, which they divided evenly amongst themselves. *Ibid.*; Tr. 807-808; see Tr. 86-92, 222-223, 233, 417-432, 790-798, 801-802, 808-809. Approximately six months later, Ludwigsen moved to Florida. Tr. 62-63. Other group members attempted to duplicate the NatWest success at two other banks, but they were unsuccessful. Tr. 812-814.[1]

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[1] While petitioner asserts (Br. 16) that the jury "hung" on the NatWest bank robbery, the record reflects that district court instructed the

Around 1996, petitioner, Mangiavillano, Dono, and another attempted a night-deposit-box theft on Long Island. Tr. 817-818. Mangiavillano was imprisoned for bank burglary later that year and was subsequently deported. Tr. 828-829. In 1997, petitioner, Dono, John Micali, and two others were arrested for possessing burglar's tools, Tr. 693-715, and Bellafiore returned to prison for committing additional bank thefts, Tr. 302. From 1998 to 1999, the group, which now, in addition to petitioner, Dono, Fiseku, and Bellafiore, included Micali and Ronald Petrino as core members, committed or attempted to commit numerous night-deposit-box thefts in New York, New Jersey, Ohio, and Wisconsin. Tr. 310-318, 320-325, 330-384, 396-408, 433-438, 738-742, 1140-1144; Gov. C.A. Br. 14-19.

2. a. On September 9, 2003, a federal grand jury indicted petitioner and other members of the group. After every defendant except petitioner, Dono, and Petrino entered guilty pleas, the grand jury returned a superseding indictment for the remaining defendants. Superseding Indictment (Jan. 6, 2005).[2] That indictment charged petitioner with participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C.

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jury that it need not reach a decision on that predicate act if it found two or more other racketeering predicates warranting petitioner's conviction on RICO charges. Tr. 1484. The jury found petitioner guilty on the RICO counts, leaving the verdict form blank with respect to the NatWest predicate. Tr. 1491; cf. J.A. 15-18; Tr. 1520-1521 (assessing RICO forfeiture). The NatWest evidence was available for the jury to use in finding the existence of an enterprise.

[2] Dono and Petrino entered guilty pleas shortly thereafter. See Dist. Ct. Docket entry (Jan. 25, 2005).

1962(d); bank burglary conspiracy, in violation of 18 U.S.C. 371; and nine counts of bank burglary and attempted bank burglary, in violation of 18 U.S.C. 2113(a). J.A. 14-25 (redacted superseding indictment).

Section 1962(c), which Congress enacted as part of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(c).

RICO also contains statutory definitions for several terms, including "pattern of racketeering activity" and "enterprise." 18 U.S.C. 1961. A "pattern of racketeering activity" requires at least two acts of "racketeering activity," which the Act defines to mean any of the predicate offenses specifically enumerated in Section 1961(1). 18 U.S.C. 1961(5). In addition, the predicate offenses must be "related" and must "amount to or pose a threat of continued criminal activity" in order to constitute a "pattern" of racketeering activity. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989); see *id.* at 240-243. The indictment alleged that petitioner participated in the conduct of the affairs of an enterprise though a pattern of racketeering activity that consisted of, *inter alia*, predicate acts of interstate transportation of stolen night-deposit-box funds. J.A. 15-18.

The indictment further alleged that the "enterprise" with which petitioner was associated was "a group of individuals associated in fact" who "functioned as a continuing unit for [the] common purpose" of "generating money" through "criminal activity, including bank robberies, bank burglaries and interstate transportation of stolen money." J.A. 13-14.

RICO provides that the term "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In *United States* v. *Turkette*, 452 U.S. 576 (1981), this Court explained that "an enterprise includes any union or group of individuals associated in fact" and concluded that the term includes "a group of persons associated together for a common purpose of engaging in a course of conduct" whether that conduct be lawful or criminal. *Id.* at 580, 583. The Court further ruled that the existence of such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583.

b. Tracking the language of RICO and *Turkette*, the district court instructed the jury that "the term 'enterprise' includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." J.A. 111. An enterprise, the court explained, may therefore consist of "an informal association of individuals" who "'associate' together for a purpose of engaging in a course of conduct" even if the association is not "a form[al] business entity such as a corporation" and "is not recognized as a legal entity." *Ibid.*

The district court stated that "you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and * * * by evidence that the people making up the association functioned as a continuing unit." J.A. 112. "Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what is does, rather than by abstract analysis of its structure." J.A. 111-112.

Finally, the court instructed the jury that, "in order to establish the existence of such an enterprise, the government must prove that: (1) there is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose." J.A. 112. With respect to the "organization" prong of this test, the court explained that "it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." J.A. 112-113.

Petitioner objected, *inter alia*, to the court's instruction that an enterprise could be established "without structural hierarchy" and that the enterprise's organization need not "have any particular or formal structure." J.A. 103-104. Petitioner requested that the district court instead instruct the jury that the government must prove beyond a reasonable doubt that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." J.A. 95; C.A. App. A683. The district court declined to incorporate petitioner's proposed language. See J.A. 111-113.

The jury acquitted petitioner on one bank burglary count (Count Four) but found petitioner guilty on the remaining 11 counts. J.A. 7. The district court sentenced petitioner to 151 months of imprisonment. J.A. 10.

4. The court of appeals affirmed petitioner's convictions but vacated his sentence. Pet. App. 1a-4a.

Petitioner argued on appeal that the district court erred, *inter alia*, in declining to instruct the jury that the government must establish that an association-in-fact enterprise under RICO must have "an ascertainable structural hierarchy distinct from the charged predicate acts." Pet. C.A. Br. 19-20 (emphasis omitted). The court of appeals did not specifically discuss that issue, stating instead that it had considered petitioner's "challenges to the judgment of conviction" and found them "without merit." Pet. App. 3a. The court of appeals vacated petitioner's sentence for reasons not pertinent here, and it remanded for resentencing. *Id.* at 3a-4a.

5. On remand, the district court credited petitioner for 33 months of imprisonment that petitioner served on a New York state burglary conviction and otherwise reimposed the same sentence. Amended Judgment (Apr. 18, 2008). Petitioner's appeal from that judgment is currently pending before the court of appeals.

SUMMARY OF ARGUMENT

The court of appeals correctly rejected petitioner's contention (Br. 19-20) that a group of individuals associated in fact to conduct criminal activity must have some "particular or formal structure" apart from the pattern of racketeering activity in which its members engage in order to constitute an "enterprise" under RICO. Cf. J.A. 103-104. RICO's text and structure demonstrate that Congress defined "enterprise" broadly to include a wide range of both formal and informal associative groups. When the common purpose of such a group is to pursue criminal acts, a criminal "enterprise" can exist even if the group does not display an "ascertainable structure beyond that inherent in the commission" of those crimes (Pet. i). The evidence in this case amply illustrates such an enterprise.

Congress defined "enterprise" broadly to "include[ ]" "any" legal entity (including "any individual, partnership, corporation, [or] association") and "any union or group of individuals associated in fact" that lacks a recognized legal existence. 18 U.S.C. 1961(4). That definition embraces a "group of individuals associated in fact" whose members are "associated together a common purpose of engaging in a [criminal] course of conduct" and who form a "formal or informal" organization whose members "function as a continuing unit." *United States* v. *Turkette*, 452 U.S. 576, 583 (1981).

Nothing in RICO's text suggests that a criminal association-in-fact must possess an ascertainable structure beyond that inherent in its members' coordinated criminal activity. Indeed, the essence of such an association is the common purpose that binds its members and prompts them to function as a unit over time to commit crimes. Petitioner's extra-textual restriction on RICO's "enterprise" concept is inconsistent with Congress's use of expansive language in Section 1961(4), which imposes "no restriction upon the associations embraced by [that] definition." *Turkette*, 452 U.S. at 580. As this Court has recognized, RICO targets criminal associations that "extend well beyond" those traditionally understood as "organized crime" in order to apply to "a wide range of criminal activity, taking many different forms" and involving "a broad array of perpetrators operating in many different ways." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 243, 248-249 (1989).

An association-in-fact may be composed of as few as two members. It would therefore be anomalous for Congress to have intended that such a group must reflect the formalistic structure suggested by petitioner. Two-person enterprises do not require decision-making protocols, command structure, or fixed roles to operate effectively to pursue a common objective. Moreover, Congress expressly provided that "any individual" may constitute an enterprise. If an individual qualifies as an enterprise under RICO, there is no sound reason to conclude that an "ascertainable structure" is essential to RICO's enterprise concept. Indeed, elsewhere in the act that enacted RICO, Congress explicitly addressed the structure of an enterprise needed to trigger criminal liability, see 18 U.S.C. 1955(b)(1)(ii), but included no analogous language in RICO to limit the scope of its enterprise definition. There is no reason to disregard that presumably conscious decision in drafting RICO by importing the kind of amorphous "ascertainable structure" requirement suggested by petitioner.

Petitioner is incorrect in his suggestion that an ascertainable structure requirement is needed to avoid merging the "enterprise" concept into a RICO's "pattern of racketeering activity." An enterprise may exist absent such a pattern where, for instance, a criminal group forms to pursue non-racketeering activities. Likewise, an individual can commit a pattern of racketeering activity with a changing pool of confederates who might not form an association-in-fact. And, even when an individual participates in the conduct of the affairs of an enterprise by engaging in a pattern of racketeering, that pattern standing alone may not demonstrate the existence of the enterprise. Of course, when two or more persons associate together to coordinate their actions to commit jointly a series of related racketeering crimes that either extend over a substantial period of time or threaten such continued activity, their coordinated activities can reflect both the existence of an "enterprise" and a "pattern" of racketeering activity. *Turkette* recognized that the evidence of those elements may "coalesce" in particular cases without merging those distinct elements into one. 452 U.S. at 583.

Petitioner's limited textual analysis does not support his conclusion that an "enterprise" must have an "ascertainable structure" beyond that reflected in its activities. The phrase "group of individuals associated in fact although not a legal entity" does not in itself suggest any structural requirement. Likewise, the antecedent types of enterprises in Section 1961(4) do not imply that the "group" must be structured. Finally, the fact that RICO's title includes the word "organizations" provides no basis for restricting the broad text employed by Congress to define "enterprise." RICO's purpose and legislative history similarly focus on the need to combat "organized crime," but this Court has concluded that Congress, for cogent reasons, enacted a much broader statute that extended well beyond organized crime to capture a wide range of criminal activity taking many different forms. RICO's broad definition of "enterprise," which includes "any" "group of individuals associated in fact," accordingly imposes no structural requirement beyond that which is inherent in a group's ongoing and coordinated conduct of racketeering activity.

Petitioner's reliance on the rule of lenity and principles of constitutional avoidance are misplaced because the statute is broad, not ambiguous. And rules to avoid asserted ambiguity or constitutional concerns cannot justify adding a far more ambiguous extra-textual gloss of "ascertainable structure," which petitioner himself is incapable of defining with any precision.

Applying the correct test, the jury was correctly instructed and the evidence sufficed to support the finding of an enterprise. Petitioner and his confederates planned a series of bank heists, played various roles in carrying out their *modus operandi*, made decisions collectively, and functioned as a coordinated unit over a period of several years. Nothing more was needed to establish an enterprise for purposes of RICO.

ARGUMENT

PETITIONER'S RICO CONVICTIONS SHOULD BE AFFIRMED BECAUSE A RICO ENTERPRISE EXISTS WHEN A CONTINUING UNIT OF INDIVIDUALS, EVEN WITHOUT ADDITIONAL ASCERTAINABLE STRUCTURE, FORMS FOR THE PURPOSE OF CARRYING OUT A PATTERN OF RACKETEERING ACTIVITY

Congress has made it unlawful under RICO for any person "associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). RICO's definitional section provides that, as used in the Act, the term "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). Contrary to petitioner's contention, an enterprise may be established, as this Court stated in *United States* v. *Turkette*, 452 U.S. 576, 583 (1981), based on proof of an association with a "common purpose" to engage in an activity, in which the associates "function as a continuing unit." No ascertainable structure need exist apart from and in addition to such proof. Accordingly, the jury instructions in this case were correct in stating that neither "structural hierarchy" nor a "particular or formal structure" is required, J.A. 112, and the evidence on this point overwhelmingly supports petitioner's convictions.

I. AN ILLICIT RICO ENTERPRISE NEED NOT HAVE AN ASCERTAINABLE STRUCTURE SO LONG AS IT IS AN ONGOING ORGANIZATION WHOSE ASSOCIATES FUNCTION AS AN ONGOING UNIT

The language and structure of RICO demonstrate that an "enterprise" includes "a group of persons associated together for a common purpose of engaging in a course of [criminal] conduct" who "function as a continuing unit." *Turkette*, 452 U.S. at 583. The "ascertainable structure" requirement that petitioner would impose has no foundation in RICO's text or logic and is inconsistent with the decisions of this Court repeatedly refusing to engraft such extra-textual limitations into RICO's deliberately expansive statutory provisions.

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A. The Language And Structure Of RICO Demonstrate That An "Enterprise" Need Not Possesses An Independent Ascertainable Structure

1. RICO's definition of "enterprise" contains no "ascertainable structure" qualification

For nearly three decades, this Court has concluded that RICO imposes "*no restriction* upon the associations embraced by the definition" of "enterprise" because "an enterprise includes *any* union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580 (emphases added); accord *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260-261 (1994) (*NOW*) (construing "enterprise"). "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)), and Section 1961(4) employs the term not once but twice: first, to include "any * * * legal entity" within its definition of enterprise and, second, to include "any union or group of individuals associated in fact," 18 U.S.C. 1961(4), that lacks such a "legal existence." See *Turkette*, 452 U.S. at 582 & n.4.[3]

The phrase "group of individuals associated in fact," 18 U.S.C. 1961(4), demonstrates the breadth of RICO's

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[3] This Court has read the term "any" narrowly in circumstances where the statutory context included a term of art that "compelled that result," where another statutory term "made sense only under [such] a narrow reading," and where the "clear statement rule" required for waivers of sovereign immunity made a more limited reading appropriate. *Ali*, 128 S. Ct. at 836 n.4. This Court's recognition that RICO's text imposes "no restriction" upon the associations included in the in the definition of "enterprise" (*Turkette*, 452 U.S. at 580), however, reflects that no such consideration here warrants departing from the normal, expansive meaning of "any."

"enterprise" concept. A "group" of individuals naturally is understood as encompassing "a number of individuals bound together by a community of interest, purpose, or function" and, thus, includes a collection of individuals "associated formally or informally for a common end." *Webster's Third New International Dictionary* 1004 (1993) (principal copyright 1961). The verb "associate," moreover, is commonly used to "signif[y] confederacy or union for a particular purpose, good or ill," such that an "association" of individuals logically is understood as "a collection of persons who have joined together for a certain object." *Black's Law Dictionary* 156 (rev. 4th ed. 1968). Under the commonly understood meanings of those terms, individuals may "associate" in a "group" regardless whether the resulting entity has any particular ascertainable structure.

Consistent with that understanding of those terms, this Court in *Turkette* held that RICO's definition of "enterprise" encompasses "a group of persons associated together for a common purpose of engaging in a course of conduct" regardless whether that conduct is lawful or criminal. 452 U.S. at 583. The Court additionally explained that the existence of such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Ibid.* That focus on the coordinated actions of the group's members (*i.e.*, their functioning as a unit) and the recognition that an enterprise includes an informal organization illustrate that a criminal "enterprise" under RICO need not have any ascertainable structure beyond that implicit in its associates' pursuit of their common goal of engaging in a (criminal) course of conduct.

Indeed, *Turkette* explained that the proof used to establish a "series of criminal acts * * * of racketeering committed by the participants in the enterprise" and the proof needed to establish the existence of a RICO "enterprise" itself "may in particular cases coalesce." 452 U.S. at 583. Proof of a pattern of racketeering activity may not always establish an enterprise. *Ibid.*; see pp. 26-28, *infra.* But the fact that proof of those two elements may coalesce shows that *Turkette*, like the statutory text of Section 1961(4), does not contemplate that a RICO "enterprise" is limited by petitioners' extra-textual requirement for an "ascertainable structure" *beyond* that reflected in the coordinated conduct of the enterprise's affairs.

That conclusion comports with the reality of "informal" associations of individuals. A group of individuals may constitute an associative "organization"—*i.e*, be able to assemble and coordinate their activities to carry out common objectives over a period of time—without having any discernible management structure. As suggested by the Court's use of the phrase "formal or informal" in *Turkette*, an association-in-fact enterprise may have a leader who runs its operations or it may operate by the informal consensus of its members; it may hold group meetings according to a schedule or it may conduct its business informally by telephone as the need arises; it may have an established headquarters or no tangible address; and each member may play a defined role in its operations or its members may alternate roles. The structural make-up of a group of individuals may be strong *evidence* of the existence of an enterprise. But, as the Court recognized in *Turkette*, the essence of an association-in-fact enterprise is not its formality or internal configuration, but its ability to pursue a common objective on an ongoing basis as a cohesive unit.[4] Such an ability may be proved by a wide variety of direct or circumstantial evidence having nothing to do with a group's structure.[5]

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[4] Petitioner argues that, as used in *Turkette*, the word "organization" (which does not appear in RICO's operative text) denotes a structured entity. See Br. 27-28. But that definition does not account for *Turkette*'s characterization of an association-in-fact enterprise as an "organization" that may be either "formal *or informal*." And, while the word "organization" may be defined with reference to the structure of an association of individuals, it may also be defined with reference to the association's common purpose. See *The Random House Dictionary of the English Language* 1364 (2d ed. 1987) (defining "organization" as "a group of persons organized for some end or work; association"); *The American Heritage Dictionary of the English Language* 1239 (4th ed. 2006) (defining "organization" as "[a] group of persons organized for a particular purpose; an association"). That understanding, rather that petitioner's, parallels *Turkette*'s focus on the "common purpose" of an association's members rather than its structure. 452 U.S. at 583.

[5] See, *e.g.*, *United States* v. *Nascimento*, 491 F.3d 25, 33 (1st Cir. 2007) (street gang "exhibited group cohesion over time; its membership pooled and shared resources; the individuals involved had a sense of belonging and self-identified as [gang] members; and the group had a well-honed set of goals"), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Owens*, 167 F.3d 739, 751 (1st Cir.) (members of drug trafficking organization provided other members with financial assistance and coordinated transportation of drugs), cert. denied, 528 U.S. 894 (1999); *United States* v. *Richardson*, 167 F.3d 621, 625 (D.C. Cir.) ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern."), cert. denied, 528 U.S. 895 (1999); *United States* v. *Davidson*, 122 F.3d 531, 535 (8th Cir.) ("The length of these associations, the number and variety of crimes the group jointly committed, and Davidson's financial support of his underlings demonstrates an ongoing association with a common purpose to reap the economic rewards flowing from the crimes, rather than a series of ad hoc relationships."), cert. denied, 522 U.S. 1034 (1997), and 523 U.S. 1033 (1998); *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.) ("The number of acts, their relationship, their having taken place over

While a "group" composed of a large number of individuals might be more likely to possess such structure in order to coordinate the efforts of its members, Section 1961(4) encompasses "any" associative "group," which, in the absence of a textual restriction, may be composed of as few as two members. Cf. *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 452 (1989) (discussing "group of two or more persons"). Congress could not have intended that such smaller association-in-fact enterprises must always include structural elements like those suggested by petitioner. Cf. Pet. Br. 33 (listing ascertainable decision-making "protocol," an identifiable chain of command, and "differentiated" roles to implementing decisions as examples of a "measure of structure"). Two-person enterprises do not require such attributes in order to operate effectively, and they would not necessarily be expected to display them. That conclusion is reinforced by the fact that Congress made it unlawful to participate in the conduct of the affairs of "any enterprise" through a pattern of racketeering activity, 18 U.S.C. 1962(c), and defined "enterprise" to include "any individual," 18 U.S.C. 1961(4). An "individual" enterprise inherently cannot have indicia of structure. There is no sound reason why Congress would

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several years, and the consistent participation of the central figures in the scheme show a 'group of persons associated together for a common purpose of engaging in a [criminal] course of conduct.'") (brackets in original), cert. denied, 492 U.S. 918 (1989); *United States* v. *Perholtz*, 842 F.2d 343, 355 (D.C. Cir.) ("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise."), cert. denied, 488 U.S. 821 (1988); *United States* v. *Qaoud*, 777 F.2d 1105, 1117 (6th Cir. 1985) (finding existence of enterprise established by "[t]he coordinated nature of the defendants' activity"), cert. denied, 475 U.S. 1098 (1986).

have provided that a RICO enterprise may consist of an individual, but not of a group of individuals who engage in acts with a common criminal purpose as a continuing unit, which like a single individual, lacks an ascertainable structure.

Petitioner's position is further undermined by the fact that Congress explicitly addressed the question of size and structure in the illegal gambling statute, 18 U.S.C. 1955, which it enacted with RICO as part of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922. The gambling statute makes it a crime to conduct an "illegal gambling business." 18 U.S.C. 1955(a). Unlike RICO, however, Section 1955 defines an "illegal gambling business" to mean a gambling business that, among other things, "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." 18 U.S.C. 1955(b)(1)(ii); see also 21 U.S.C. 848(c) (defining size and managerial characteristics of a "continuing criminal enterprise").

Petitioner himself concedes (Br. 51 n.40) that Section 1955 demonstrates that "Congress knows how to impose an express structure requirement when it wants to." If Congress had intended to require a RICO enterprise to have an ascertainable structure, it presumably would have followed a similar course and addressed the subject directly.[6] Yet, while Section 1961 contains extensive definitional provisions for the key terms in RICO, it offers no guidance whatever for defining petitioner's proffered concept of "ascertainable structure." The "absence of any reference to * * * [such structure]—much less any definition of the [term]—is strong evidence that Congress did not intend to make * * * [an ascertainable structure] an element of a * * * [RICO] violation." *United States* v. *Culbert*, 435 U.S. 371, 373 (1978).

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[6] Cf. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 244 (1989) (if Congress had intended to limit RICO's coverage to organized crime, it would have "explicitly [so] stated"); *NOW*, 510 U.S. at 261 (similar; rejecting "economic motive" requirement for "enterprise"); *Turkette*, 452 U.S. at 581 (similar; declining to restrict "enterprise" to legitimate entities).

Petitioner's suggestion (Br. 51 n.40) that "Congress had to paint more broadly" in RICO because Section 1955 targets a much narrower scope of activity, even if accurate, fails to account for RICO's complete textual silence on the subject. In RICO contexts where textual support was similarly unavailable, this Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008) (citing cases); see, *e.g.*, *NOW*, 510 U.S. at 260-261 (refusing to adopt economic-motive limitation for a RICO "enterprise" where "Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive"); *Turkette*, 452 U.S. at 580-581 (declining to "depart[] from and limit[]" the statutory definition of "enterprise" to legitimate entities because the definition imposes "no restriction upon the associations embraced by [its terms]" and Congress could have, but did not, "narrow[] the sweep of the definition by inserting" text to that effect).

Petitioner's notion of an "ascertainable structure" requirement not only lacks textual foundation, it also reflects an indefinite concept that petitioner himself is unable to define. Petitioner offers several vague formulations in his brief of an "ascertainable structure" requirement. See, *e.g.*, Br. 15 ("An identifiable structure requirement * * * contemplat[es] some ongoing directional apparatus, though not the reticulation of, say, a corporation or Mafia family."); Br. 29 (jury can sometimes "infer some independent organization from the nature, frequency and duration of the predicate acts," but, in other cases, "additional evidence of structure will be necessary"). He also offers examples of "[a] measure of structure," including "a protocol for taking decisions; a chain of command for communicating them; and/or differentiated role players to carry them out," which, he asserts "mak[es] the test clear and comprehensible." Br. 33. Those attempts to articulate petitioner's nontextual requirement amply illustrate that "structure" "is hardly a self-defining term" and will only compound confusion. See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 n.3 (1989). In contrast, in the district court, petitioner emphasized a requirement of "an ascertainable structural *hierarchy* distinct from the charged predicate acts." J.A. 95 (emphasis added). Whatever clarity might be offered by a strict requirement of "structural hierarchy," petitioner no longer seems to espouse that limitation, advocating instead more expansive descriptions of "structure" that find no support in RICO's text.

Engrafting petitioner's restrictive "structure" requirement onto Section 1961(4) also would run contrary to this Court's long-standing admonition that "RICO is to be read broadly." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985) (*Sedima*). "RICO was an aggressive initiative to supplement all remedies and develop new methods for fighting crime," *id.* at 498, and, while Congress intended the Act to be used to combat organized crime, "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.*, 492 U.S. at 248; accord *NOW*, 510 U.S. at 260.

RICO's drafters thus "followed a 'pattern [of] utilizing terms and concepts of breadth,'" *H.J. Inc.*, 492 U.S. at 237 (quoting *Russello* v. *United States*, 464 U.S. 16, 21 (1983)), and followed that practice in adopting the definition of "enterprise." *Russello*, 464 U.S. at 21; see *NOW*, 510 U.S. at 257 ("RICO broadly defines "enterprise."); *Turkette*, 452 U.S. at 580-581. The statute accordingly targets criminal associations that "extend well beyond[] those traditionally grouped under the phrase 'organized crime'" in order to apply to "a wide range of criminal activity, taking many different forms" and involving "a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 243, 248-249; see *NOW*, 510 U.S. at 262 ("The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (quoting *Sedima*, 473 U.S. at 499). Petitioner's extra-textual "ascertainable structure" requirement is incompatible with Congress's conception of a RICO enterprise. In short, Congress itself imposed "no restriction upon the associations embraced by" RICO's definition of "enterprise," *Turkette*, 452 U.S. at 580, and it is not this Court's role to impose such a restriction for Congress.

2. A RICO "enterprise" and a "pattern of racketeering activity" are distinct concepts that do not merge

Notwithstanding the textual breadth of Section 1961(4), petitioner contends that a RICO enterprise must have "some sort of structure beyond that attending the pattern of racketeering activity * * * in which its participants engage" because, without that restriction, the term "enterprise" will merge into the "pattern" and be rendered "wholly 'superfluous.'" Br. 4, 10-11, 39-40. Petitioner is incorrect.

a. This Court in *Turkette* rejected a similar argument. *Turkette* explained that an enterprise is an "entity," there, as here, a "group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583. Even when the enterprise and the related course of conduct are purely criminal, the Court concluded that the "entity" (the enterprise) is necessarily distinct from the "series of criminal acts" committed by its associates (the pattern). *Ibid.* As a formal matter, the "entity" and the "acts" of its members can never merge: "The 'enterprise' * * * is an entity separate and apart from the pattern of activity." *Ibid.* Moreover, as *Turkette* recognized, neither concept is superfluous in practice because it is entirely conceivable that a requisite "enterprise" or "pattern" will exist without the other. *Ibid.* ("[P]roof of one does not necessarily establish the other.").

A criminal association-in-fact "enterprise" exists as an "entity" when a continuing unit of individuals associate in order to achieve an illegal end. *Turkette*, 452 U.S. at 583. The "enterprise may exist even if its membership changes over time." *United States* v. *Perholtz*, 842 F.2d 343, 364 (D.C. Cir.), cert. denied, 488 U.S. 821

(1988).[7] A "pattern of racketeering activity," in turn, is present only if several criteria are met. The pattern must, first, involve a series of two or more predicate acts of "racketeering activity," 18 U.S.C. 1961(5), with only a discrete subset of all criminal offenses qualifying as such. See 18 U.S.C. 1961(1) (specifically enumerating the crimes qualifying as "racketeering activity"). In addition, multiple racketeering acts themselves do not constitute a "pattern" of racketeering activity unless those acts are both "related" to each other and "amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239.

The fact a group of individuals may associate in fact and function as an ongoing unit to achieve a particular criminal end (thereby creating an "enterprise") thus will not give rise to a "pattern" of "racketeering activity" if those individuals commit offenses other than those specifically enumerated in Section 1961(1) or their offenses are either insufficiently related or insufficiently persistent to threaten continuing racketeering activity. Conversely, a "pattern of racketeering activity" can exist in the absence of an association-in-fact "enterprise." Suppose that an individual commits a series of similar bank robberies over several years, in each case using a different cast of associates to carry out the roles of decoy, lookout, and getaway-car driver. The crimes may readily form a "pattern," by exhibiting both continuity and relationship. But the shifting personnel, with only one common member for each crime, would not constitute an enterprise: the criminals would not form an organization pursuing a common purpose and functioning as a continuing unit. Accordingly, proof establishing a "pattern" of racketeering activity does not necessarily establish an "enterprise."[8]

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[7] See also, *e.g.*, *United States* v. *Smith*, 413 F.3d 1253, 1267 (10th Cir. 2005) (ruling that an enterprise may exist as a continuing unit "even if some individuals left [it] and were replaced by new members at a later date"), cert. denied, 546 U.S. 1120 (2006); *United States* v. *Nabors*, 45 F.3d 238, 241 (8th Cir. 1995) ("[T]he personnel of an enterprise may undergo alteration without loss of the enterprise's identity as an enterprise."); *United States* v. *Hewes*, 729 F.2d 1302, 1317 (11th Cir. 1984) ("The law does not require all members of the RICO enterprise to have maintained their association with it throughout the enterprise's life."), cert. denied, 469 U.S. 1110 (1985).

b. Of course, if a group of individuals who join together formally or informally for the common purpose of engaging in a pattern of racketeering activity and, functioning as a criminal unit, actually achieve that end by jointly completing a pattern of racketeering, those individuals will have created an association-in-fact "entity" through their actions. In addition, any group member who "participates" in the conduct of such an entity's affairs "through a pattern of racketeering activity" will violate Section 1962(c) if the affairs of the enterprise affect interstate or foreign commerce. See 18 U.S.C. 1962(c). That result, however, simply reflects that the actions of the group as a whole and the criminal defendant have established the "enterprise" and "pattern" elements of a Section 1962(c) offense. It may well be true that, when a multi-member association-in-fact exists to commit crimes and their crimes form a RICO "pattern," a jury could always infer the existence of an enterprise. But that result would not require manipulation of the definition of enterprise to require some additional proof. As the Court recognized in *Turkette*, in addressing this very point, "[l]anguage in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent." 452 U.S. at 583 n.5. The concept of "enterprise" plays a factually and legally distinct role from "pattern" in many contexts. If the evidence used to prove the two "coalesce" in certain cases, *id.* at 583, it is no cause for reading new requirements into RICO, as petitioner urges the Court to do here.[9]

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[8] In contrast, if a core group of associates carries out similar crimes over time, with certain personnel changing during the life of their activities, the existence of that core group pursuing a common purpose can be strong evidence of the existence of an enterprise. Such evidence underscores the common purpose of the associates and their ability to function as a continuing unit, even as individual members come and go.

The ability of RICO to reach groups of criminals who operate over time even without formal structure or relationships other than their criminal endeavors is critical to achieving RICO's goals. Cf., *e.g.*, *United States* v. *Elliott*, 571 F.2d 880, 898 n.19 (5th Cir.) (noting that "the enterprise operated in a manner calculated to minimize direct evidence of association"), cert. denied, 439 U.S. 953 (1978). This Court has recognized that "Congress was concerned in RICO with long-term criminal conduct," and that that concern—together with the list of predicate racketeering offenses that Congress has specifically targeted—limits the scope of the statute through "RICO's key requirement of a *pattern* of racketeering." *H.J. Inc.*, 492 U.S. at 236, 242 (emphasis added) (noting that RICO's expansive uses appear primarily to result from "the breadth of the predicate offenses" in Section 1961(1) and the "concept of 'pattern'") (quoting *Sedima*, 473 U.S. at 500); cf. *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (A "*pattern* of racketeering" lies at "the heart of any RICO" charge.). "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the pattern] requirement" and lie beyond the reach of the Act. *H.J. Inc.*, 492 U.S. at 242. But where, as here, a pattern of crimes is committed by a group of individuals dedicated to the commission of that activity and operating together to achieve it, RICO's purposes are fully engaged.

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[9] In *Turkette*, the government argued that "[w]e do not suggest that any two sporadic and isolated offenses by the same actor or actors *ipso facto* constitute an 'illegitimate' enterprise; rather the existence of the enterprise as an independent entity must also be shown." 452 U.S. at 583 n.5. The Court's response was that, even if "that were not the case," it would not matter because the "enterprise" element need not add something in *all* contexts in order to avoid superfluity. *Ibid.* And the "enterprise" element indisputably adds a unique requirement where the enterprise is a legal entity or an entity with mixed lawful and unlawful functions. Notably, the government's analysis in *Turkette* preceded this Court's holding in *H.J. Inc.* that a RICO pattern requires continuity plus relationship. The evidence establishing those additional features of a "pattern," in most cases, does provide sufficient proof of an enterprise when the enterprise is wholly illegal.

c. The government's evidence of a defendant's pattern of racketeering activity may accordingly lead the jury to infer an "enterprise." Where the defendant's racketeering activities are performed jointly with the same core group of individuals and follow a sufficiently identifiable "pattern," a jury may infer that the group has joined as associates in fact for the very purpose of committing those crimes. In that sense, as *Turkette* recognizes, "the proof used to establish these separate elements may in particular cases coalesce." 452 U.S. at 583. A particular jury might not make that circumstantial inference, however, in the absence of additional evidence to conclude that an enterprise exists. Thus, the government will often produce direct or circumstantial evidence beyond a particular defendant's pattern of racketeering activity to establish the existence of an enterprise and link the defendant's pattern of racketeering to the enterprise.

That evidence, for instance, may address activities undertaken by other alleged group members and the relationship of those activities to the defendant's pattern of conduct; the degree of continuity of core participants in such activities; and other factors illustrating ongoing, purposeful, and coordinated conduct.[10] Evidence of an "ascertainable structural hierarchy" (J.A. 95), which petitioner would have required the jury to find (J.A. 102), could add to the government's proof but "the existence of an association-in-fact is oftentimes more readily proven by "what it *does* * * * than by abstract analysis of its structure." *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir.), cert. denied, 464 U.S. 840, and 464 U.S. 917 (1983). Just as one may deduce the existence of a marital or other relationship from observing the related parties interact, a jury may properly infer the existence of an ongoing criminal association-in-fact from the conduct of its membership.

Many factors that can prove an enterprise would also facilitate the racketeering activity, but those factors are neither identical to the racketeering acts themselves nor essential for the commission of those acts. Indeed, an enterprise's structural make-up would also presumably be designed to facilitate its criminal objectives. It is clear from *Turkette*'s holding that an association-in-fact enterprise may be "wholly criminal," 452 U.S. at 583, that the government is not required to show that a criminal enterprise has some structure unrelated to its criminal objectives in order to demonstrate that the existence of that enterprise. See *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir.) (en banc), cert. denied, 128 S. Ct. 464 (2007); *United States* v. *Kragness*, 830 F.2d 842, 857 (8th Cir. 1987); *United States* v. *Riccobene*, 709 F.2d 214, 223-224 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

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[10] Numerous factors may be relevant, for example: the purchase or retention of tools used by members in their criminal activity; patterns of financial transactions or possession of property; the maintenance of records associated with criminal activities; efforts to develop new opportunities to engage in crime or to solicit customers for criminal services; the manner in which members maintain lines of communication; processes used to plan operations and make group decisions; profit sharing from criminal activity; post-racketeering-act efforts to avoid detection or to intimidate witnesses; members' joint participation in lawful activities or in crimes other than acts of racketeering; and the association of its members apart from the criminal activities in which they engage.

d. In support of his position that RICO requires that an enterprise have an ascertainable structure separate from the "pattern of racketeering activity," petitioner focuses (Br. 5, 10) on the Court's explanation in *Turkette* that "[t]he 'enterprise' * * * is an entity separate and apart from the pattern of activity in which it engages" and its "existence * * * at all times remains a separate element which must be proved by the government." 452 U.S. at 583. That passage "is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity." *Odom*, 486 F.3d at 551. And, while *Turkette* makes clear that the existence of an enterprise is an element of a RICO offense that, like any element of any offense, must be proved by the government, it plainly "is not a statement that an associated-in-fact enterprise must have some kind of separate structure." *Ibid.*

Even the approaches adopted by the four courts of appeals that require that an association-in-fact enterprise have an existence separate from the predicate acts of racketeering of its members lend little support to petitioner. Of those four, only the Eighth Circuit has stated that proof of an ascertainable structure is needed to establish that an enterprise exists separately from such acts. See, *e.g.*, *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003); *United States* v. *Bledsoe*, 674 F.2d 647, 665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). The other three require proof of some ascertainable structure but do not impose the requirement as a means of showing that the enterprise has an existence separate from its members' racketeering acts. Those courts instead conclude that separateness is established by other factors. See, *e.g.*, *United States* v. *Console*, 13 F.3d 641, 651-652 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir.), cert. denied, 502 U.S. 845 (1991); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985). Thus, in *Console*, the court found its "separate existence" requirement to be satisfied where the association-in-fact enterprise "coordinated the commission of multiple predicate offenses * * * and continued to provide legitimate services during the period in which they were engaged in racketeering activities." 13 F.3d at 652. In *Tillett*, the requirement was found to be satisfied by evidence that the enterprise set up a legitimate business as a front for its smuggling operation, purchased trucks and equipment, and formed a corporation to purchase a boat. 763 F.2d at 632. And in *Sanders*, the requirement was found to be satisfied because "the group continued to exist and thrive on heroin sales without any particular contribution of individuals and conducted numerous predicate acts of racketeering." 928 F.2d at 944.

Even the Eighth Circuit, despite stating that an association-in-fact enterprise must have an ascertainable structure distinct from that inherent in the conduct of the predicate acts, routinely considers factors other than the enterprise's structure in determining whether the enterprise satisfies the "separate existence" requirement. See, *e.g.*, *United States* v. *Crenshaw*, 359 F.3d 977, 991 (2004) ("patterns of retaliation and intimidation undertaken to protect and defend the enterprise's business and associates"); *United States* v. *Keltner*, 147 F.3d 662, 668-669 (use in later robberies of items stolen in earlier robberies), cert. denied, 525 U.S. 1032 (1998); *id.* at 669 ("several acts of intimidation and solicitation of perjury to protect [members'] identit[ies]"); *United States* v. *Davidson*, 122 F.3d 531, 535 ("family and social relationships" between members) (citation omitted), cert. denied, 522 U.S. 1034 (1997), and 523 U.S. 1033 (1998); *ibid.* ("numerous acts of retaliation and intimidation" and an "attempt to involve a local sheriff in a murder-for-hire"); *United States* v. *Darden*, 70 F.3d 1507, 1521 (1995) ("shar[ing of] information [by members] to protect their drug trade, avoid apprehension, and defeat competitors"), cert. denied, 517 U.S. 1149, and 518 U.S. 1026 (1996); *United States* v. *Leisure*, 844 F.2d 1347, 1363 (1987) ("family and social relationships between members of group"), cert. denied, 488 U.S. 932, 960 (1988); *ibid.* ("concerted attempt to gain control of the local unions, which can be viewed in complete isolation from the group's pattern of racketeering activity"); *Kragness*, 830 F.3d at 857 ("activities aside from the commission of the alleged predicate acts"); *ibid.* (purchases of property and planes suitable for drug flights, and rental of hangars and a house) *id.* at 857-858 (use of banking and financial services).

Indeed, the Eighth Circuit has held that the "separate existence" requirement may be satisfied where "a group engaged in a diverse pattern of crimes," notwithstanding that the crimes are all charged as predicate racketeering acts. *Bledsoe*, 674 F.2d at 665. Thus, in *United States* v. *Lemm*, 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983), where the predicate acts consisted of arson and mail fraud involving the delivery of insurance claims, the court held that the "separate enterprise" requirement was satisfied in that "[t]he arson ring, through hand-delivery of insurance claims, could have conducted its activities without any predicate acts of mail fraud. In other words, if we eliminate for purposes of argument the predicate acts of mail fraud, the evidence still shows an on-going structure which engaged in legitimate purchases and repairs of property as well as acts of arson." *Id.* at 1201. In short, petitioner's notion that any "separate existence" requirement may be satisfied only by proof that the enterprise had an ascertainable structure is not one that appears to be followed in practice by any court of appeals.

3. An independent "ascertainable structure" requirement is not necessary to distinguish between conspiracy and RICO offenses

Petitioner contends (Br. 11-13, 47-49) that, without an "ascertainable structure" requirement, every long-term conspiracy under 18 U.S.C. 371 to commit predicate racketeering acts listed in Section 1961(1) would give rise to a RICO enterprise, and every participant in such a conspiracy would be a RICO offender. Petitioner's concern that "vast amounts of conspiracy law" would be "RICO-ize[d]," Br. 48, misunderstands the nature of both conspiracy and a RICO offense under Section 1962(c).

a. First, a conspiracy violating Section 371 will not necessarily give rise to an enterprise. "Conspiracy is an inchoate offense, the essence of which is an *agreement* to commit an unlawful act." *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) (emphasis added). Because a conspiracy is complete under Section 371 once such an agreement is formed with the requisite scienter and an overt act is taken in pursuit of the conspiracy, criminal liability attaches "regardless of whether the crime agreed upon actually is committed." *United States* v. *Feola*, 420 U.S. 671, 694 (1975); see *Salinas* v. *United States*, 522 U.S. 52, 63 (1997). The offense accordingly has no temporal requirement and may be committed in the brief span it requires for two people to agree on a criminal object and to take a step toward its effectuation. No *actual* degree of coordinated effort is required.

By contrast, an association-in-fact enterprise, as *Turkette* makes clear, is an *organization* or *entity*—whether formal or informal—that has an "ongoing" existence and whose members "*function* as a continuing unit." See 452 U.S. at 583 (emphasis added). While the organization need not possess any ascertainable structure, its members must actually coordinate their efforts to achieve the *raison d'etre* of their association in fact: the "common purpose of engaging in a course of conduct." See *ibid.* Thus, conspiracies to commit predicate racketeering acts have the potential to evolve into association-in-fact enterprises if their members take coordinated actions to achieve that end.

b. In any event, petitioner is mistaken in his belief (Br. 11, 47) that a RICO offense carrying a "drastically enhanced penalty" will result from mere conspiracies violating Section 371. A RICO offense under Section 1962(c), requires much more than just the existence of an enterprise; it requires that the defendant participate in the conduct of the enterprise's affairs through an actual "pattern of racketeering activity." That pattern, as noted, requires the defendant to commit at least two (or more) actual predicate racketeering offenses listed in Section 1961(1) that are both "related" and amount to or pose a threat of continuing criminal activity. *H.J. Inc.*, 492 U.S. at 237, 239-243. Not every long-term predicate conspiracy will satisfy RICO's pattern element. And if one does, a defendant can hardly complain that his actual pattern of racketeering acts triggered a RICO prosecution.

c. Petitioner contends further (Br. 50) that an "ascertainable structure" requirement is needed to maintain a distinction between a Section 1962(c) offense and a RICO conspiracy under Section 1962(d). A RICO conspiracy to violate Section 1962(c) involves an agreement to "further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense" under Section 1962(c). *Salinas*, 522 U.S. at 65. Where an association-in-fact enterprise is legitimate, the enterprise will obviously be distinct from any agreement to conduct it through a pattern of racketeering. The situation is somewhat different, however, for illegitimate association-in-fact enterprises. A criminal association-in-fact enterprise ordinarily may subsume one or more conspiracies to commit substantive crimes, because such an enterprise is defined in part by the common objective of its members to commit such offenses together or to facilitate one another's commission of criminal acts. For this same reason, an illegitimate association-in-fact enterprise (at least where its very purpose is to commit RICO-qualifying offenses) will ordinarily subsume a RICO conspiracy. This Court essentially recognized as much when it observed in *Salinas* that in such cases it may be "somewhat difficult to determine just where the enterprise ends and the [RICO] conspiracy begins, or, on the other hand, whether the two crimes are coincident in their factual circumstances." *Ibid.* But, contrary to petitioner's view, an illegitimate association-in-fact enterprise would be no less coincident with a RICO conspiracy if the enterprise had an ascertainable structure than if it did not; if anything, the existence of such a structure would merely provide additional proof of the RICO conspiracy.

Petitioner's reliance (Br. 13, 47) on *United States* v. *Santos*, 128 S. Ct. 2020 (2008), is misplaced for similar reasons. The "merger" concern expressed by the plurality and Justice Stevens in *Santos* arose from the view of those Justices that commission of a predicate gambling offense would virtually always be a violation of the money-laundering statute, 18 U.S.C. 1956. *Santos*, 128 S. Ct. at 2026-2027 (plurality opinion); *id.* at 2033 (Stevens, J., concurring). But it is certainly not the case that any series of crimes committed by conspirators would almost always violate RICO. And to the extent that *RICO* conspirators who actually carry out their crimes would also violate RICO's substantive provision, nothing in that conclusion is problematic. See *Iannelli*, 420 U.S. at 777-778 ("[I]t is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end.").

4. An independent "ascertainable structure" requirement finds no support in this Court's **Turkette, Reves,** *and* **H.J. Inc.** *decisions*

Petitioner's leading arguments (Br. 24-37) parse the text of a series of this Court's RICO decisions, using dictionary definitions to construe the "plain language" of those opinions (Br. 24) rather than the plain language of the statute. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute" and, instead, must properly be "read in context." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979); accord *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 159 (2002) (Breyer, J., dissenting); *CBS* v. *FCC*, 453 U.S. 367, 385 (1981). When read as a whole, neither *Turkette*, *supra*, *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), nor *H.J. Inc.*, *supra*, supports petitioner's "ascertainable structure" requirement.

a. As previously explained, *Turkette* recognized that Congress placed "no restriction upon the associations embraced by the definition" of enterprise, which includes even "informal" organizations of individuals associated in fact to engage in a criminal course of conduct. 452 U.S. at 580, 583. The fact that *Turkette* describes an "enterprise" as an "entity" or "organization" (terms that do not appear in RICO's text) simply does not speak to whether the entity or organization must have "a cohesive structure" beyond that needed to implement the coordinated conduct of its members. Indeed, the district court's instruction that the jury must find "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives," J.A. 112, more than satisfied *Turkette*.

b. *Reves* likewise does not support petitioner's contention. The "enterprise" in *Reves* was a farmer's cooperative which, through its board of directors and general manager, hired an accounting firm to conduct its annual audit, and the accounting firm was subsequently sued under RICO's civil remedy provisions for its conduct connected with the audit. The Court concluded that a person may not be liable for a RICO violation under Section 1962(c) unless that person "participate[d] in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 185. In doing so, the Court expressly declined to decide what degree of direction of an enterprise's affairs is needed to satisfy the so-called "operation or management" test, *id.* at 184 n.9, but explained that "significant control" is unnecessary and noted that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id.* at 179 n.4, 184 (citation omitted).

Petitioner seizes upon the Court's use of the words "operate" and "management" to conclude that "*Reves* plainly contemplates the existence of a structured enterprise," Br. 32-34, but the Court's decision merely reflects unremarkable fact that some RICO enterprises will be structured hierarchically, like the farmer's cooperative in *Reves*. The Court's "operation and management" test does not presuppose that all RICO enterprises will have ascertainable structures. A group of individuals may "operate" a criminal enterprise—*i.e.*, plan and carry out the enterprise's criminal activity—without having a leader or other discernible structural identity. Indeed, even in the context of structured organizations, the courts of appeals have recognized that a person may operate an enterprise without having a supervisory position.[11]

c. Petitioner's reliance (Br. 34-36) on *H.J. Inc.* is equally misplaced. *H.J. Inc.* held that predicate racketeering acts will constitute a "pattern" under RICO only if they are "related" and "themselves amount to, or * * * otherwise constitute a threat of, *continuing* racketeering activity," explaining that a "threat of continuity" is established, for instance, "where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." 492 U.S. at 239-240, 242-243. The fact that a pattern must involve a threat of or continuing racketeering activity, however, does not support petitioner's conclusion that such a requirement "intrinsically connotes structure." Br. 35. A criminal association may enjoy a long life as a cohesive unit while lacking any formalistic structure, and nothing in *H.J. Inc.* suggests that an independent showing of structure is required in order to prove continuity.

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[11] See, *e.g.*, *United States* v. *Posada-Rios*, 158 F.3d 832, 856 (5th Cir. 1998) (*Reves* does not require that a defendant have "'decision-making' power," but only that he "'take part in' the operation of the enterprise.") (citation omitted), cert. denied, 526 U.S. 1031, 1080, 1137 (1999); *United States* v. *Houlihan*, 92 F.3d 1271, 1298-1299 (1st Cir. 1996) (upholding instruction that jury could find that the defendant participated in the conduct of the enterprise even though he had no part in the management or control of the enterprise where defendant was an "insider[ ]" who was "integral to carrying out the enterprise's racketeering activities"), cert. denied, 519 U.S. 1118 (1997); *United States* v. *Starrett*, 55 F.3d 1525, 1548 (11th Cir. 1995) (Those who "implement[ ]" decisions made by others are liable under the "operation or management" test.), cert. denied, 517 U.S. 1111, 1127 (1996).

5. *Petitioner's textual analysis of Section 1961(4), like the title and purpose of RICO, does not support an independent "ascertainable structure" requirement*

Petitioner's textual analysis (Br. 38-39, 40-44) focuses on two discrete aspects of Section 1961(4)'s definition of enterprise and RICO's statutory title, none of which supports petitioner's "ascertainable structure" requirement.

a. Petitioner contends (Br. 41-42) that the conjunction "although" in the phrase "group of individuals associated in fact although not a legal entity" reflects that such a group must have an ascertainable structure because, in petitioner's view, the text following "although" implies that the group is just "structured without the aid of legally defined structural forms such as the business corporation." *Limestone Dev. Corp.* v. *Village of Lemont*, 520 F.3d 797, 804-805 (7th Cir. 2008). But the category of association-in-fact enterprises that are "not legal entit[ies]" encompasses both associations-in-fact that have an ascertainable structure and those that do not. The words "although not a legal entity" merely bring within the definition of "enterprise" associative entities that have no independent legal existence. See *Turkette*, 452 U.S. at 582. The notion that association-in-fact enterprises must in some particular way be *like* legal entities does not follow from the text which applies only to enterprises that are *not* legal entities.

Petitioner contends that his reading is "reinforced by the fact that before 'any union or group of individuals associated in fact' . . . appears a list of [formally structured] legal entities" including partnerships and corporations, Br. 44 (quoting *Limestone Dev. Corp.*, 520 F.3d at 805) (brackets in original). But Section 1961(4)'s list of legal entities also includes "any individual" and therefore is not confined to entities displaying a "structural form." Consequently, even if the non-legal entities in Section 1961(4) were limited by traits of the legal entities that precede them in that provision, it "would be improper to engraft this characteristic upon the second category of enterprises" because it "is not a universal characteristic of the specifically listed enterprises." *Turkette*, 452 U.S. at 582 n.4.

Turkette, moreover, rejected the argument that the scope of the association-in-fact clause should be limited by the list of legal entities in Section 1961(4)'s opening clause. The court of appeals in *Turkette* had reasoned that "because each of the specific enterprises enumerated in § 1961(4) is a 'legitimate' one, the final catchall phrase—'any union or group of individuals associated in fact'—should also be limited to legitimate enterprises." 452 U.S. at 581. This Court, however, held that the principal flaw in that reasoning was the assumption that an association-in-fact enterprise, as described in the second clause of Section 1961(4), constitutes a "more general" category than the legal entities listed in the opening clause. *Id.* at 582. "Each category describes a *separate* type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not," and therefore that "[t]he latter [category] is not a more general description of the former." *Ibid.* (emphasis added).

b. Petitioner also relies on the word "union" in the second clause of Section 1961(4). Building from the premise that "union" means "labor union," petitioner argues (Br. 42-44) that, because labor unions have ascertainable structures, so must association-in-fact enterprises. Even assuming that Congress intended "union" to refer solely to "labor unions" in Section 1961(4), petitioner incorrectly concludes that the phrase "any * * * group of individuals associated in fact" must, like a labor union, have some formalized structure. Labor unions may have any number of characteristics, including leadership by election, established headquarters, formal bylaws, and management hierarchy. The simple fact that the phrase "group of individuals" follows "union" in Section 1961(4) is an unsound basis from which to infer that Congress intended such a "group" to share in any one those characteristics.

c. Petitioner contends (Br. 38-39) that the word "organizations" in the title of Chapter 96 of Title 18 ("Racketeer Influenced and Corrupt Organizations," 84 Stat. 941) "is synonymous with 'structure.'" The word "organization," however, cannot carry the weight petitioner would place upon it. See p. 19 & n.4, *supra*. Even if it could, "[t]he title of a statute . . . cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted). Especially where the statutory text is "complicated and prolific," as it is in RICO, it may contain provisions that are "unreflected" in the title. *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947). Indeed, this Court has previously rejected the view that RICO's "broad language should be read narrowly" to limit the statute to its purported purpose, "as revealed in the Act's title," of combating organized crime. *H.J. Inc.*, 492 U.S. at 245-246.

6. The purpose of the RICO statute does not support an independent "ascertainable structure" requirement

Petitioner's reliance (Br. 53-58) on the statutory purposes reflected in RICO's preamble and legislative history is misplaced for similar reasons. Petitioner argues that RICO was intended to eradicate organized crime and infers from that objective that the statute's reach must be limited to organized-crime-type enterprises—*i.e.*, enterprises with an independent ascertainable structure. Br. 53-54. Of course, organized crime was Congress's "major target" in enacting RICO. *H.J. Inc.*, 492 U.S. at 245. That fact, however, does not support petitioner's "ascertainable structure" requirement.

a. The "authoritative statement [of Congress] is the statutory text." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Ibid.* As shown above, the language of RICO's operative text is broad and unambiguous with respect to an "ascertainable structure" requirement. Absent any relevant ambiguity in that text, "th[e] first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

b. In any event, petitioner's contentions are foreclosed by this Court's decision in *H.J. Inc.* The Court there held that a RICO defendant's "pattern of racketeering activity" need not be characteristic of organized crime or an organized-crime-type perpetrator. 492 U.S. at 244-249. The Court's rationale is fatal to petitioner's argument that RICO enterprises must be characteristic of organized crime. First, the Court's rejected an organized-crime limitation because such a limitation "would seem to require proof that the racketeering acts were the work of an association or group, rather than of an individual acting alone," a requirement not imposed by the text of the statute. *Id.* at 244. Second, the Court rejected the proposed limitation on the ground that RICO is not like other statutes and other titles of the OCCA that are expressly limited to organized-crime contexts. *Id.* at 244-245.[12]

Finally, notwithstanding its finding that the legislative debates and reports focused on the need to combat organized crime, *H.J. Inc.*, 492 U.S. at 245, the Court concluded that an organized crime limitation on RICO's pattern element would be "at odds with the tenor of [the statute's] legislative history." *Id.* at 244. That legislative history shows that Congress deliberately rejected an organized crime limitation on the statute's scope, opting instead for "language capable of extending beyond organized crime." *Id.* at 246. The Court explained that, while "[t]he occasion for Congress's action was the perceived need to combat organized crime," Congress "for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."

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[12] The Court cited two provisions of the OCCA: Section 501, 84 Stat. 933 (repealed 1984) (stating that the Attorney General may provide for the security of witnesses "in legal proceedings against any person alleged to have participated in organized criminal activity"), and Section 601(a), 84 Stat. 934 (18 U.S.C. 3503(a) (2000)) (repealed 2002) (permitting the deposition of a witness to preserve testimony for a legal proceeding upon motion by the Attorney General certifying that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity"). *H.J. Inc.*, 492 U.S. at 244-245. The Court also referred to the Omnibus Crime Control and Safe Streets Act of 1968, §601(b), Pub. L. No. 90-351, 82 Stat. 209 (defining "organized crime" as the "unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations"). 492 U.S. at 245.

Id. at 248; cf. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56 (1970) (explaining that RICO will reach the "infiltration of *any* associative group by any ['person']" because it "defines 'enterprise' to include associations in fact, as well as legally recognized associative entities") (emphasis added); cf. also 18 U.S.C. 1961(3) (defining "person").

Petitioner does not argue that a RICO enterprise must be an organized crime entity; he argues only that it must possess an attribute characteristic of such an entity. But the Court in *H.J. Inc.* rejected a similar argument—that "a defendant's racketeering activities form a pattern only if they are *characteristic* either of organized crime in the traditional sense, or of an organized-crime-type perpetrator." 492 U.S. at 243 (emphasis added). Moreover, the Court in *H.J. Inc.* concluded that a RICO pattern need not be indicative of an organized crime perpetrator "in either a traditional *or functional* sense." *Id.* at 244 (emphasis added). *H.J. Inc.* therefore stands for the proposition that the broad scope of the RICO statute may not be limited by reference to the statute's overriding purpose of eradicating organized crime.

7. *Petitioner's remaining contentions are without merit*

Petitioner contends (Br. 44-46, 50-51, 63-69) that two statutory provisions (18 U.S.C. 1955 and 1959) indicate that a RICO enterprise must satisfy petitioner's "ascertainable structure" requirement and that the rule of lenity and doctrine of constitutional avoidance counsel in favor of that restriction. Each of those contentions is misplaced.

a. First, the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. 1959, makes it unlawful to commit a violent crime in return for anything of pecuniary value from "an enterprise engaged in racketeering activity," or for the purpose of gaining entrance to or maintaining or increasing one's position in such an "enterprise." 18 U.S.C. 1959(a). Borrowing from RICO, the statute defines "enterprise" as "includ[ing] any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1959(b)(2). Petitioner argues that a Section 1959 enterprise must have an ascertainable structure in order for outsiders to be able to gain entry to it or for its members to be able to maintain or increase their positions in it. He then concludes that, if a Section 1959 enterprise must have an ascertainable structure, so must a RICO enterprise. Br. 44-46.

Petitioner's premise is incorrect. A Section 1959 association-in-fact enterprise need not have an independent ascertainable structure in order for the statute to be violated. For example, a member of an enterprise lacking any such structure may violate the statute by seeking to take control of the enterprise by violence, thereby imposing structure upon it. Similarly, an outsider may gain admittance to an enterprise, an insider may maintain his membership in an enterprise, and a person may receive something of pecuniary value from an enterprise even if the enterprise is an association-in-fact that lacks an ascertainable structure.[13]

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[13] Even if the Congress that enacted Section 1959 in 1984 had assumed that RICO's definition of "enterprise" contemplated that an enterprise must *always* possess an ascertainable structure, that post-enactment understanding of RICO's provisions would be "beside the point," *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998), because a subsequent Congress cannot "supplant the contemporaneous intent" of the Congress that enacted RICO in 1970. *Waterman S.S.*

b. Petitioner argues (Br. 50-51) that, without an "ascertainable structure" requirement, RICO "would swallow[,] if not negate," the federal gambling statute, 18 U.S.C. 1955. That statute makes it a crime to operate a gambling business that violates the law of the State in which it is conducted; involves five or more persons who conduct, finance, manage, supervise, direct, or own the business; and remains in continuous operation for more than 30 days or has a gross revenue of $2000 in any single day. According to petitioner (Br. 51), "absent a structured enterprise requirement, prosecutors could evade § 1955's five-or-more-managers threshold * * * simply by charging two months or even two lucrative days of group gambling as a § 1962(c) offense." That is incorrect.

If the government brought a RICO prosecution under Section 1962(c) alleging a Section 1955 offense as a predicate racketeering act, it would have to prove the defendant violated Section 1955 by establishing every element of that crime, including the "five-or-more-managers threshold." Alternatively, if the government

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Corp. v. *United States*, 381 U.S. 252, 269 (1965); see *Russello*, 464 U.S. at 26.

The internal policies reflected in the *U.S. Attorneys' Manual* likewise cannot alter the meaning of the statute. Those policies, in any event, recognize that "the statutory definition of 'enterprise' [in Section 1959] is very broad," but, as matter of prosecutorial discretion, provide that "[n]o prosecution under [S]ection 1959 will be approved unless the *enterprise* has an identifiable structure and purpose apart from the racketeering activity and crimes of violence it is engaged in." Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9.110-812(C) (1997) (emphasis added). That policy, by its own terms, contemplates that not all enterprises will have an identifiable structure and purpose apart from an associated pattern of racketeering.

charged multiple state felony gambling offenses as the relevant predicate acts (see 18 U.S.C. 1961(1)(A)), and those state-law offenses did not include a similar management requirement as an element of the crime, the government would not need to prove management participation. By specifically authorizing the use of state gambling offenses as RICO predicates, however, Congress expressed its intent to allow RICO prosecutions of gambling enterprises that, while meeting RICO's "ongoing organization" and "continuing unit" requirements, might not satisfy Section 1955's "five-or-more managers threshold." That by no means "negates" the effect of Section 1955. And, even if it did, it would be a congressionally authorized negation that would not be remedied by petitioner's "ascertainable structure" requirement (which itself would not require a five-or-more-managers rule).

c. Finally, petitioner's reliance (Br. 63-69) on the rule of lenity and the principle of constitutional avoidance is misplaced.

i. The rule of lenity applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule." *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citation omitted).

There is no need to resort to the rule of lenity because the statute is not ambiguous; it is simply—and unambiguously—broad. *Sedima*, 473 U.S. at 499. And there is no textual warrant for the courts to add an "ascertainable structure" gloss that is itself an ambiguous and "amorphous concept." See *H.J. Inc.*, 492 U.S. at 241 n.3 (citation omitted).

ii. While statutes should be construed, where possible, to avoid constitutional questions, see *Salinas*, 522 U.S. at 59-60, that interpretive cannon has no application here. Petitioner contends (Br. 64-66) that, without an "ascertainable structure" requirement, the RICO statute would unconstitutionally remove the enterprise element from the jury's consideration and render RICO unconstitutionally vague. Both arguments rest on the premise that a structural requirement is necessary to prevent RICO's enterprise and "pattern of racketeering activity" elements from merging. But, as shown above, the absence of such a requirement presents no "merger" problem.[14]

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[14] One of petitioner's amici contends that the Court should adopt petitioner's interpretation of "enterprise" in order to avoid the federal prosecution of traditionally local crimes. Center on Admin. of Crim. Law Amicus Br. 17-28. This Court, however, rejected such an interpretive approach in *Turkette*, concluding that, even if a disputed interpretation of RICO would "substantially alter the balance between federal and state enforcement of criminal law," Congress was "well aware that it was entering a new domain of federal involvement" when it enacted RICO and "the courts are without authority to restrict the application of the statute" where Congress acts within its legislative power. 452 U.S. at 586-587. This Court has repeatedly revisited RICO's text and has never adopted a narrowing construction to accommodate such concerns. See, *e.g.*, *Bridge*, 128 S. Ct. at 2145 (addressing RICO's purport-

II. THE EVIDENCE ESTABLISHED A VALID RICO ENTERPRISE EVEN IF THE ORGANIZATION LACKED AN INDEPENDENT ASCERTAINABLE STRUCTURE

In this case, the district court properly denied petitioner's request for an "ascertainable structure" instruction and correctly charged the jury that an enterprise need not have any "particular or formal structure." J.A. 112. The evidence, moreover, was sufficient to establish that the charged association-in-fact qualified as a RICO enterprise. Regardless of whether it lacked an ascertainable structure, petitioner's enterprise had a common purpose and functioned as a continuing unit.

The enterprise, as established by the evidence, consisted of an association informally organized for the purpose of committing bank theft. The organization engaged in dozens of successful and attempted bank thefts in several States over a nine-year period, reflecting a degree of sophistication and experience typical of ongoing criminal organizations. The enterprise maintained a consistent core of members throughout its existence, while also having the ability to recruit new members as older ones were incarcerated or moved away. Tr. 664. The members gathered together at a social club in Brooklyn run by one of their own, Tommy Dono, Tr. 308, 501, and they were bound together by their mutual trust in one another's competence and loyalty, Tr. 213-214, 664-665.

Although the enterprise lacked a distinct management structure, it operated in an organized fashion. Members of the group would scout for opportunities to commit night-deposit-box theft based on settled criteria: The targeted boxes were a particular type that the mem-

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ed "'over-federalization' of traditional state-law claims").

bers had developed an expertise in dismounting, Tr. 45, 304-305, 434, 437, and were situated in areas where there was a high volume of cash deposits, such as shopping malls, Tr. 304, 343, 366-373, 439-441. Once a satisfactory opportunity was located, a member of the organization would assume the role of "organizer" and assemble the participants for the operation. Tr. 500-503. Those members participating in a theft would then meet to plan the operation, Tr. 501-502, 679, 929, and decisions were made by agreement rather than dictated by a leader. Tr. 929. The operations would ordinarily take place early in the week, when the boxes still contained weekend deposits. Tr. 45. Each participant played a distinct role in the operations. Some acted as lookouts, equipped with police scanners and walkie-talkies. Tr. 43-44, 47, 48, 212, 317, 337-338, 782. Others, usually two or three, were charged with prying the night-deposit box from the wall and removing the deposit bags. Tr. 43, 299, 317, 334, 359-360, 443-447. On each operation, the members brought along a set of tools: hammers, screwdrivers, ratchet sets, crowbars, chains, and fishing gaffs, as well as the police scanners and walkie-talkies. Tr. 43, 48, 312-313, 317, 320, 337-338, 349-350, 383, 443-445, 666. Following a theft, the participating members would split the proceeds according to a settled arrangement. The group conducted the bank vault burglaries and bank robberies in a similarly coordinated manner. Tr. 323, 455, 528-529.

As the above discussion demonstrates, the organization had a tangible existence beyond the bare minimum necessary to commit the related predicate acts of interstate transportation of bank-theft funds. Its members associated together independent of their racketeering activity; had a meeting place; recruited new members;

retained tools of their illicit trade, Tr. 213; had a routine for developing new bank theft opportunities, for planning operations, and for making decisions; retained the ability to assemble and coordinate their members to conduct bank thefts as opportunities arose; and had an arrangement for dividing the proceeds of their operations. Petitioner's characterization of the group's operations as "*ad hoc* and impromptu," Br. 18, does not comport with the evidence in this case. And on the record evidence, there is no basis for overturning the jury's conclusion that the prosecution established a RICO enterprise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*, as amended, provides in pertinent part:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of natu-

ralization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means * * * ;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means * * * ;

(7) "racketeering investigator" means * * * ;

(8) "racketeering investigation" means * * * ;

(9) "documentary material" includes * * * ;

(10) "Attorney General" includes * * * .

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * * * *

2. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. 1955 provides in pertinent part:

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

* * * * *

4. 18 U.S.C. 1959 provides in pertinent part:

Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

* * * * *

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

REPLY
BRIEF

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No. 07-1309

In The

Supreme Court of the United States

OCTOBER TERM 2008

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EDMUND BOYLE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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Table of Contents

Table of Authorities iii

Statement 1

Argument 6

An Association-In-Fact Enterprise Must Have an Ascertainable Structure Distinct from Its Participants' Predicate Crimes 6

I. The Government Improperly Equates Enterprise and Pattern, Eliminating Enterprise as an Independent Element in All Illicit Association Cases 6

II. The Government Misreads If Not Rewrites *Turkette*, Pressing a Boundless View of Association-In-Fact Enterprises 16

III. A Separate Structure Requirement Comports with RICO's Text and This Court's Cases 20

IV. Associative Enterprises May Be Structured Formally or Informally . . 24

V. A Separate Structure Test is Simple, Straightforward and Easy to Apply . 29

Conclusion 37

Table of Authorities

Case

Page

American Mfrs. Mut. Ins. Co. v. Towson, 912 F. Supp. 291 (E.D. Tenn. 1995) 27

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 4, 10, 12

Apprendi v. New Jersey, 530 U.S. 466 (2000) 30

Beck v. Prupis, 529 U.S. 494 (2000) 23

Blakely v. Washington, 542 U.S. 296 (2004) 30

Boulware v. United States, 128 S. Ct. 1168 (2008) 29

Burdett v. Miller, 957 F.2d 1375 (7th Cir. 1992) . . . 24

Calcasieu Marine Nat'l Bank v. Grant, 943 F.2d 1453 (5th Cir. 1991) 32

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 10, 25, 26

Crowe v. Henry, 43 F.3d 198 (5th Cir. 1995) 27

Dura Pharms., Inc. v. Broudo, 544 U.S. 336 (2005) 30

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) . 24

Guidry v. Bank of LaPlace, 954 F.2d 278 (5th Cir. 1992) 26

H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 11, 23, 28, 29

Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chi., 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985) 20

Hedgepeth v. Pulido, 129 S. Ct. 530 (2008) 36

Holmes v. Sec. Inv. Protection Corp., 503 U.S. 258 (1992) 23

Limestone Dev. Corp. v. Village of Lemont, Il., 520 F.3d 797 (7th Cir. 2008) 18, 21, 22, 25, 32

McCullogh v. Suter, 757 F.2d 142 (7th Cir. 1985) . . 26

Mohawk Inds. v. Williams, 05-465, 2006 WL 1194498 (April 26, 2006) 12

Nat'l Org. For Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 2, 20, 26

Ocean Energy II v. Alexander & Alexander, Inc., 868 F.2d 740 (5th Cir. 1989) 8

Old Chief v. United States, 519 U.S. 172 (1997) . . 15

Procter & Gamble Co., et al. v. Amway Corp., et al., No. H-9723 84 (S.D. Tex., Houston Div.) 15

Reves v. Ernst & Young, 507 U.S. 170 (1993) 4, 19, 23, 25, 28, 29

Salinas v. United States, 522 U.S. 52 (1997) 7, 11, 20

Sandstrom v. Montana, 442 U.S. 510 (1979) 13

Scheidler v. Nat'l Org. For Women, Inc., 537 U.S. 393 (2003) 23

Scheidler v. Nat'l Org. For Women, Inc., 547 U.S. 9 (2006) 8

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 8, 10

Staples v. United States, 511 U.S. 600 (1994) 23

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983), *abrogated on other grounds*, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) 2

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) 18, 31

United States v. Booker, 543 U.S. 220 (2005) 3

United States v. Chong, 419 F.3d 1076 (9th Cir. 2005) 31

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995) 34

United States v. Davidson, 122 F.3d 531 (8th Cir. 1997) 34

United States v. Ewings, 936 F.2d 903 (7th Cir. 1991) 18

United States v. Feliciano, 223 F.3d 102 (2d Cir. 2000) 32

United States v. Ferguson, 758 F.2d 843 (2d Cir. 1985) 2

United States v. Gaudin, 515 U.S. 506 (1995) 13

United States v. Johnson, 440 F.3d 832 (6th Cir. 2006) 5

United States v. Jones, 482 F.3d 60 (2d Cir. 2006) 28, 33, 35

United States v. Korando, 29 F.3d 1114 (7th Cir. 1994) 2, 5, 24, 25, 30, 32

United States v. Korfant, 771 F.2d 660 (2d Cir. 1985), *overruled on other grounds*, *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990) 27

United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) 34

United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988) 33

United States v. Lemm, 680 F.2d 1193 (8th Cir. 1982) 31

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) 3, 5, 8, 35

United States v. Mazzei, 700 F.2d 85 (2d Cir. 1983) 28

United States v. McDade, 28 F.3d 283 (3d Cir. 1994) 3

United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) 32

United States v. Nabors, 45 F.3d 238 (8th Cir. 1995) 27

United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008) 33

United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986) 10

United States v. Neder, 527 U.S. 1 (1999) 13

United States v. Olson, 450 F.3d 655 (7th Cir. 2006) 4, 10

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001) 33

United States v. Pelullo, 964 F.2d 193 (3d Cir. 1992) 30

United States v. Pimentel, 346 F.3d 285 (2d Cir. 2003) 33

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983) 31

United States v. Richardson, 167 F.3d 621 (D.C. Cir. 1999) 32

United States v. Russotti, 717 F.2d 27 (2d Cir. 1983) 12

United States v. Santos, 128 S. Ct. 2020 (2008) 29, 36

United States v. Simmons, 923 F.2d 934 (2d Cir. 1991) 35

United States v. Smith, 413 F.3d 1253 (10th Cir. 2005) 33, 35

United States v. Tillett, 763 F.2d 628 (4th Cir. 1985) 32, 34

United States v. Torres, 191 F.3d 799 (7th Cir. 1999) 32, 34

United States v. Turkette, 452 U.S. 576 (1981) . . . . *passim*

United States v. Weiner, 3 F.3d 17 (1st Cir. 1993) . . 7

United States v. White, 116 F.3d 903 (D.C. Cir. 1997) 33

United States v. Yannotti, 541 F.3d 112 (2d Cir. 2008) 35

Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 30

Statutes

18 U.S.C. § 1961(3) 26

18 U.S.C. § 1961(4) . . . . *passim*

18 U.S.C. § 1962(c) . . . . *passim*

No. 07-1309

In The

Supreme Court Of The United States

October Term, 2008

EDMUND BOYLE,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Statement

Edmund Boyle wins this case on the government's own brief. The government concedes that under *United States v. Turkette*, 452 U.S. 576 (1981), enterprise and pattern are independent elements of a RICO[1] offense that must be separately considered and found by the jury. *See* Ans. 25-37. Yet the Second Circuit impermissibly conflates the two, espousing a *per se* rule whereby enterprise is "functionally equivalent" to, *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir. 1985) (citations and internal quotes omitted), and "no more than the sum of the predicate racketeering acts" forming the pattern. *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983) (collecting cases), *abrogated on other grounds*, *Nat'l Org. For Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

Relying on *Turkette*, Boyle objected to the rule's application in this case, seeking a jury instruction that required a structured enterprise "distinct from the charged predicate acts." JA 95, 97-109, 113-14. The District Court denied the request. Instead, following circuit practice, it delivered an instruction that did not explain the need for an enterprise separate from its members' predicate crimes. JA 111-13.

That was error. In other circuits, juries are "properly instructed," consistent with *Turkette* and 18 U.S.C. § 1962(c)'s plain language, that an enterprise must have a structure "separate from the commission of the predicate acts themselves." *United States v. Korando*, 29 F.3d 1114, 1118 (7th Cir. 1994) (Flaum, J.)

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68.

(internal quotation marks omitted); *accord United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.) (jury "properly instructed" that "informal enterprise" must "exist[ ] as an organization with a structure ... separate from the predicate acts themselves"). *See also* Fifth Cir. Pattern Jury Instr. 2.78 ("The enterprise must be separate and apart from the pattern of racketeering activity in which the defendant engaged."); Seventh Cir. PJI 18 U.S.C. § 1961(4) ("The government must prove the association had some form or structure beyond the minimum necessary to conduct the charged pattern of racketeering."); Eighth Cir. PJI 6.18.1962D ("The government must ... prove that the association had a structure distinct from that necessary to conduct the pattern of racketeering activity.").

It is a given that the jury must find all the essential elements of a crime in order to convict. *United States v. Booker*, 543 U.S. 220, 230 (2005) (citation omitted). To keep § 1962(c)'s elements apart, juries must be told that enterprise and pattern are separate and distinct concepts, and that there must be something to differentiate the two. *See, e.g., United States v. McDade*, 28 F.3d 283, 295 (3d Cir. 1994) (Alito, J.) (enterprise "must be something more than simply the pattern of racketeering activity") (citations and footnote omitted).

That something is an identifiable structure beyond the predicate acts themselves. RICO primarily targets coordinated criminality – cohesive criminal groups whose sophistication, longevity and access to resources heighten their danger and make them harder to prosecute. Those are the qualities that attracted Congress's attention and dominated its focus, driving the statute's passage and rationalizing its enhanced penalties. And they are the qualities that justified limited federal intervention in an area of traditional state concern, implicating national rather than purely local interests. *See generally, e.g.,* Br. 7, 14-15, 36-37 n.23, 53-58; *Amicus* Br. for Center on the Administration of Criminal Law 4-6, 17-28.

Structure embodies these characteristics in a shorthand "formulation that is easy to apply," *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), preserving the enterprise's vitality as a truly separate element. After all, the crime is not just committing predicate acts, but doing so "in connection with the conduct of an *enterprise*," *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) (citation and internal quotes omitted) (emphasis supplied) – the "essence"[2] of the statutory scheme and a "critical limitation" on RICO's vast scope. *Reves*, 507 U.S. at 183. And the "central element"[3] of an enterprise – its indispensable "hallmark"[4] – is structure.

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[2] Lynch, "RICO: The Crime of Being a Criminal, Parts III & IV," 87 Colum. L. Rev. 920, 942-43, 954 & n.149 (1987) ("Lynch").

[3] *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006) (citation and internal quotes omitted).

Because the challenged instruction did not require the jury to find an enterprise separate and apart from the charged pattern – let alone a separate *structured* enterprise – Boyle's conviction cannot stand. The judgment below, and the Second Circuit's underlying *per se* rule, therefore must be vacated. Future RICO juries should be instructed, as in the Seventh Circuit, that an association-in-fact enterprise "must have a structure ... separate from the commission of the predicate acts themselves." *Korando*, 29 F.3d at 1118 (internal quotation marks omitted); *accord Masters*, 924 F.2d at 1367 (similar).

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[4] *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) (citation and internal quotes omitted).

ARGUMENT

AN ASSOCIATION-IN-FACT ENTERPRISE MUST HAVE AN ASCERTAINABLE STRUCTURE DISTINCT FROM ITS PARTICIPANTS' PREDICATE CRIMES

I. THE GOVERNMENT IMPROPERLY EQUATES ENTERPRISE AND PATTERN, ELIMINATING ENTERPRISE AS AN INDEPENDENT ELEMENT IN ALL ILLICIT ASSOCIATION CASES

At bottom, the government urges an even broader rule than the Second Circuit's. Though professing that enterprise and pattern are "distinct concepts that do not merge," Ans. 25, it actually takes the opposite tack, demonstrably meshing the two. Thus, the government appears to contend that proof of a RICO pattern will "*always*" establish the existence of an illicit association-in-fact enterprise under 18 U.S.C. § 1962(c). *Id.* 27 ("It may well be true that, when a multi-member association-in-fact exists to commit crimes and their crimes form a RICO 'pattern,' a jury could *always* infer the existence of an enterprise.") (emphasis supplied); *accord, e.g., id.* 29 (RICO "fully engaged" where pattern of crimes committed by "group of individuals dedicated to [ ] commission of that activity and operating together to achieve it").

That is an extraordinary proposition. Contrary to the government's characterization (Ans. 27), it is *not* merely a recognition that pattern and enterprise proof may coalesce in "particular cases," as *Turkette* allows. 452 U.S. at 583. Nor is it a simple acknowledgment that evidence of the elements may overlap in "some contexts" or "certain cases," as the government would have it. Ans. 28 (citations and quotation marks omitted). Rather, the government seems to flatly assert that pattern evidence is legally sufficient to establish an enterprise in *all* § 1962(c) illicit association cases: the overwhelming majority of cases brought under RICO. *See, e.g., United States v. Weiner*, 3 F.3d 17, 23 (1st Cir. 1993). That cannot be the law.

By its terms, § 1962(c) makes it a crime to "conduct [an] enterprise's affairs through a pattern of racketeering activity." Its "predominant" elements are (1) conduct, (2) enterprise and (3) pattern. *Salinas v. United States*, 522 U.S. 52, 62 (1997) (citation omitted). Yet, notwithstanding its disclaimers, the government's position appears to collapse the enterprise into the pattern in all illicit association cases – not just "some"[5] or "particular"[6] ones – impermissibly merging elements (2) and (3). *See, e.g.,* Ans. 39 (equating operation of criminal "enterprise" with planning and carrying out its "criminal activity" without discernible structure). It thereby "eliminate[s]" the second element altogether, *cf.* *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985), effectively reading it out of the statute. In short, the government's approach renders enterprise synonymous with pattern in virtually every prosecution brought under RICO, making it "just a[nother] name for the crimes the defendants commit[,]" *Masters*, 924 F.2d at 1367, or a bare "summation of predicate acts," *Ocean Energy II v. Alexander & Alexander, Inc.*, 868 F.2d 740, 748 (5th Cir. 1989). It leaves the enterprise a separate element in name only, reducing it to an empty word devoid of independent meaning.

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[5] Ans. 28 (citation and internal quotes omitted).

That interpretation defies § 1962(c)'s plain language, juxtaposing enterprise with pattern, by blending the two ingredients into one. It dilutes the government's burden of proof by relieving its obligation to establish each essential offense element beyond a reasonable doubt, rasing substantial Fifth and Sixth Amendment concerns. *See, e.g.,* Br. 10, 63-64. It makes the word "enterprise" superfluous in all § 1962(c) cases involving illegal associations, subverting the "longstanding canon" that avoids nullifying constructions. *Scheidler v. Nat'l Org. For Women, Inc.*, 547 U.S. 9, 21 (2006). And it contravenes *Turkette* itself, which starkly contrasted enterprise and pattern, stressing that they are "separate" and distinct concepts and that "proof of one does *not* necessarily establish the other." 452 U.S. at 583 (enterprise must "exist[ ]" as an "entity separate and apart from the pattern of activity in which it engages") (emphasis supplied).

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[6] *Turkette*, 452 U.S. at 583.

In this regard, it is telling that *Turkette* itself involved an illicit association-in-fact. If pattern proof alone were legally sufficient enterprise evidence in *all* such cases, as the government seems to maintain, then *Turkette* presumably would have said so. Instead, it pointedly limited the evidentiary convergence to "particular cases." *Id.* That could not have been an accident.

In any event, negating a critical offense element in an entire class of cases, as the government's view effectively does, would still pose constitutional problems – even if the element has meaning in other "contexts." Ans. 28. For constitutional rights are personal, and every criminal defendant – whether charged in an illicit enterprise or not – is entitled to a jury determination of each separate element in his or her individual case. *See supra* 3.[7]

---

[7] The government's *amicus* suggests that the "requirement[ ] of distinctness" between person (*i.e.*, defendant) and enterprise, together with "the proof needed to demonstrate an associat[ion]-in-fact," makes structure "superfluous." Br. for Natl. Assn. of Shareholder and Consumer Attys. (NASCAT Br.) 6-7 & n.4 (continued...)

By relegating enterprise to a "simple copy" of pattern in illicit association cases, *cf. Anza*, 547 U.S. at 486 (Breyer, J., *concurring and dissenting*), the government ultimately reads § 1962(c) as a glorified pattern statute that punishes the mere repeat commission of predicate acts. *See, e.g.*, Ans. 28-29 & n.9. In so doing, it consigns the "central"[8] enterprise component to a bare "afterthought,"[9] something akin to a *pro forma* jurisdictional device. *Contra United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("central role" of RICO's enterprise concept "cannot be

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[7](...continued)
(citation and internal quotes omitted). The argument mixes apples and oranges. At issue is distinctness between enterprise and *pattern* – not *person* – and criminal defendants are constitutionally entitled to a separate jury determination of each of those essential elements. And by *amicus*'s own account, the person/enterprise rule is inapplicable where, as here, an individual is charged in an illicit association-in-fact. *Id.* n.4; *see also, e.g.*, U.S. Dept. of Justice, *Racketeer Influenced & Corrupt Organizations: A Manual for Federal Prosecutors*, at 72 & n.98 (4th ed. July 2000) ("well established" that "an individual may be charged both as a defendant and as a member of an association-in-fact enterprise") (collecting cases); *cf. Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001) (requiring, and finding, distinctness between natural person and his closely-held corporation, a legal enterprise under first clause of 18 U.S.C. § 1961(4)).

[8] *Olson*, 450 F.3d at 664 (citation and internal quotes omitted).

[9] *Cf. Sedima*, 473 U.S. 508 (Marshall, J., joined by Brennan, Blackmun and Powell, JJ., *dissenting*).

overstated"). But that only adds another layer of superfluity, as RICO already includes an express jurisdictional element. *See* 18 U.S.C. § 1962(c) (enterprise or its activities must affect "interstate or foreign commerce").

Conjoining enterprise and pattern also raises significant notice issues under the Fifth Amendment's due process clause insofar as the pattern concept itself is dauntingly vague. *See* Br. 35-36 & n.22, 60-61, 64-66.[10] And in extolling pattern to the near exclusion of enterprise, the government turns RICO's purpose and policy on their proverbial heads. Functionally extinguishing an essential element is "bad enough with respect to any statute." *H.J.*, 492 U.S. at 255 (Scalia, J., joined by Kennedy and O'Connor, JJ., and Rehnquist, C.J., *concurring in the judgment*). But it is especially "intolerable with respect to RICO." *Id.* For contrary to the government's reimagining, the crux of a RICO offense is *not* just the commission of predicate acts. *See supra* 4. After all, those are largely prohibited under state law.

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[10] The government notes that *Turkette* preceded this Court's holding in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), that "a RICO pattern requires continuity plus relationship." Ans. 28 n.9. But the difficulty in "determin[ing] just where the enterprise ends and the [pattern] begins," *Salinas*, 522 U.S. at 65, only underscores the need for a separate structure so juries can tell the two apart. *See* Def. COA Br. at 23-25 n.12 (addressing this issue in depth). This is especially true given the pattern element's conceded breadth (Ans. 29), which makes the statute even murkier and renders the government's reading virtually unchecked. *See infra* **POINT II**.

Rather, the gist of the crime is committing those acts in conducting an integrated, ongoing, separately structured "enterprise," *Anza*, 547 U.S. at 457 (citation and internal quotes omitted) – the kind that framed the legislative debate, triggered federal concerns and prompted Congress to respond with unprecedented weaponry and sanctions. *See, e.g.*, Br. 36 n.23, 53-58; Alito, "Racketeering Made Simple(r)" at 4 in *The RICO Racket* (McDowell ed. 1989) (RICO essentially makes it a crime to "function as a member of an organized criminal group"); *cf. United States v. Russotti*, 717 F.2d 27, 32-33 (2d Cir. 1983) (unit of prosecution is enterprise *plus* pattern).

Indeed, the government effectively acknowledged as much before this very Court, conceding just two years ago that:

> Congress added a specific reference to groups of individuals [because] they were thinking in terms of mob families or syndicates, criminal gangs that had no discrete status as a legal entity. ... [T]hey wanted to make sure those were covered...

Mohawk Inds. v. Williams, 05-465, 2006 WL 1194498, at *45 (April 26, 2006) (Oral Arg. Tr.). The shift in this case is curious.[11]

This is not to suggest that a jury could *never* infer the existence of an enterprise from proof of a pattern. *Turkette* itself forecloses that claim. But to say that pattern and enterprise proof may coalesce in "particular cases," 452 U.S. at 583, also implies the opposite: that there will be other cases in which they will *not* coalesce. That is, a jury might draw different inferences from the same evidence in the discrete contexts of enterprise and pattern. For example, from proof or lack of proof of continuity, role differentiation, organization (formal or informal) and a framework for carrying out objectives, a jury might infer pattern but not enterprise or *vice versa*. Even the government seems to agree. *See generally* Ans. 25-37.

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[11] Taken to its logical extreme, the government's current position would seemingly permit judges to instruct juries to presume the existence of a criminal enterprise upon a mere finding of a RICO pattern. *Contra Sandstrom v. Montana*, 442 U.S. 510, 517-18 (1979) (presumption removing element from case on proof of predicate fact violates due process). Alternatively, it would enable judges to withhold the enterprise issue from juries and decide it themselves as a matter of law. *Contra United States v. Gaudin*, 515 U.S. 506 (1995) (removing essential element from jury's consideration offends Fifth and Sixth Amendment rights to due process and jury trial). And it would authorize judges to omit the enterprise element from their jury instructions in all illegal association cases, without repercussion, so long as the record contains a pattern finding or sufficient evidence to hypothesize one. *Contra United States v. Neder*, 527 U.S. 1 (1999) (jury instruction omitting essential element should be reviewed for harmless error on case-by-case basis). These hypothetical scenarios, seemingly plausible on the government's theory, illustrate its truly radical nature.

For that reason, the *elements* of pattern and enterprise must be considered and found separately and distinctly even though the *evidence* used to prove them may sometimes coalesce. But such separate consideration does not occur in the Second Circuit, and it did not occur under the District Court's enterprise instruction in this case. A structured enterprise requirement, faithful to § 1962(c)'s text, RICO's purpose and policy concerns, and the respect for federalism that informed them, is necessary to ensure that it will. *See, e.g.*, Br. 36-37 n.23, 53-58. Such a requirement preserves the obligatory separateness and fosters independent treatment.

Employing circular reasoning, the government insists that neither enterprise nor pattern is practically "superfluous" because it is "entirely conceivable" that one "will exist without the other." Ans. 25 (citing *Turkette*, 452 U.S. at 583). That is true in theory, but misses the point. For it assumes that *Turkette* is properly read, and juries are properly instructed, to treat pattern and enterprise distinctly. That does not happen in the Second Circuit and did not happen here.[12]

For its part, *amicus* admits the need for a separate enterprise but denies any structure requirement. NASCAT Br. 24. In fact, the two are interwoven and mutually reinforcing, structure warranting if not conferring the enterprise's separate existence. Juries should be instructed accordingly. *See* Report of Prof. G. Robert Blakey in *Procter & Gamble Co., et al. v. Amway Corp., et al.*, No. H-9723 84 (S.D. Tex., Houston Div.), at 2 ("The *structure* and function of major organized crime groups, generally consisting of associated enterprises engaging in patterns of legal and illegal activity, was the prototype ... for federal ... racketeering legislation that I have been involved in drafting.") (available at http://www.amquix.info/pdfs/Blakely_expert_report.pdf) (as visited Dec. 30, 2008) (emphasis supplied).

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[12] Not content to effectively erase the enterprise element in illicit association cases, the government also assumes the right to offer piles of extrinsic evidence – enormously prejudicial – to demonstrate the enterprise's existence. Ans. 29-30 & n.10. But if the pattern alone is legally sufficient to establish the enterprise, as the government appears to posit, that materially alters the admissibility calculus under Fed. R. Evid. 403. *Cf. Old Chief v. United States*, 519 U.S. 172 (1997) (need for extrinsic evidence diminished where element in question is uncontested); Br. 58-63. The government cannot have it both ways.

II. THE GOVERNMENT MISREADS IF NOT REWRITES *TURKETTE*, PRESSING A BOUNDLESS VIEW OF ASSOCIATION-IN-FACT ENTERPRISES

The government fundamentally misconstrues *Turkette*, not only fusing enterprise with pattern but rendering the term completely unconstrained.

First, the government persistently cites *Turkette* for the proposition that "[t]here is no restriction upon the associations embraced by the [enterprise] definition." 452 U.S. at 580; *see, e.g.*, Ans. 11, 16 & n.3, 24, 38. In context, however, that statement merely amplified the issue presented in *Turkette* and framed its ensuing holding, which appears in the very next sentence: 18 U.S.C. § 1961(4), by its use of the phrase "any union or group of individuals associated in fact," includes "both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." 452 U.S. at 580-81. The Court was not asked to consider whether association-in-fact enterprises may be entirely devoid of structure, as the government here contends. Nor, consequently, did it purport to do so.[13] Indeed,

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[13] These facts rebut any claim that *Turkette* negatively answered the structure question. *See* NASCAT Br. 5, 21. If anything, the shoe is on the other foot. *See, e.g.*, Br. 4, 24-30, 41

(continued...)

immediately after the "no restriction" statement cited by the government, the Court went on to identify several such restrictions: the enterprise must be an "entity separate and apart from the pattern of activity in which it engages," with an "ongoing organization" and a "continuing unit" of associates sharing a "common purpose of engaging in a course of conduct." 452 U.S. at 583. Thus, whatever else it might mean, the "no restriction" statement could not have been intended in a literal, absolute or unqualified sense.

Second, complementing its exaltation of pattern as the statutory center, the government elevates *Turkette*'s "common purpose" language to the "*raison d'etre* of [an] association in fact." Ans. 35; *see, e.g., id.* 11 ("common [criminal] purpose" is "essence of such an association"), 12, 17 (no structure required beyond that implicit in "common goal of engaging in a (criminal) course of conduct"), 18-19 ("essence" of association in fact enterprise, allegedly according to *Turkette*, is "ability to pursue a common objective"), 19 n.4 (*Turkette* supposedly focused on "common [criminal] purpose" of association's members) (citation and internal quotes

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[13](...continued)
n.28. Indeed, the First Circuit's concerns about conflating enterprise and pattern (*see* NASCAT Br. 17-21) were precisely what led this Court to spell out the distinct enterprise traits – an ongoing organization existing as a separate entity with a continuing unit of associates – animating the structure requirement.

omitted), 27 & n.8,[14] 29. But as Judge Posner wrote in a related context, that reading "truncates" this Court's opinion "misleadingly," *Limestone Dev. Corp. v. Village of Lemont, Il.*, 520 F.3d 797, 804 (7th Cir. 2008), minimizing the other key enterprise attributes enumerated in *Turkette*: again, an "entity separate and apart from the pattern," with an "ongoing organization" and a "continuing unit" of associates. 452 U.S. 583. Those features – derived from § 1962(c)'s delineation of enterprise and pattern as separate elements and § 1961(4)'s express contemplation of an "entity," legally recognized or otherwise – are the structure requirement's wellspring. And the government cannot just paper them away by playing them down.

Third, and most striking, a common purpose limitation is no limitation at all, as "*[a]ny* two wrongdoers who through concerted action commit two or more crimes [always] share a purpose." *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982) (emphasis supplied); *cf. United States v. Ewings*, 936 F.2d 903, 906 (7th Cir. 1991) (asking, rhetorically, what criminal "doesn't" have an "'appetite' for money"?). Viewed through that prism, the government's enterprise conception is wholly unbounded; every group of two or more people committing predicate crimes over time automatically qualifies, becoming instant racketeers facing 20 years in prison. *See* Ans. 36-37 (essentially conceding that government theory obliterates distinction between enterprise and conspiracy). Put more bluntly, there is almost no long-term dual or joint criminal activity that would *not* be covered – particularly given the avowed breadth of the pattern component itself. *See id.* 29; *supra* n.10. That is an absurd construction, and the Court should reject it. *Turkette*, 452 U.S. at 580 ("absurd results are to be avoided") (citation omitted). Indeed, it turns the statute upside down, this Court having explicitly recognized the enterprise as a "critical limitation" on RICO's potentially infinite reach. *Reves*, 507 U.S. at 183.

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[14] "[I]f a group of individuals ... join together ... for the common purpose of engaging in a pattern of racketeering activity and, functioning as a criminal unit, actually achieve that end," they "will have created an association-in-fact 'enterprise' through their actions."

In the end, the government invites this Court to rewrite if not overrule *Turkette* – and upset almost 30 years of precedent – by aggrandizing the enterprise's common purpose feature while degrading its separate entity, ongoing organization and continuing unit aspects: the very properties giving rise to the structure requirement. There is no reason to redefine the enterprise in this manner, and the government offers none.

III. A SEPARATE STRUCTURE REQUIREMENT COMPORTS WITH RICO'S TEXT AND THIS COURT'S CASES

That the word "structure" does not appear on RICO's face does not render the concept of structure "extra-textual." *See, e.g.,* Ans. 11, 14-15, 18, 23-24. To the contrary, the requirement that an association-in-fact enterprise have a structure separate and apart from the pattern of racketeering flows directly from the statutory language delineating "enterprise" and "pattern" as distinct elements of a § 1962(c) offense. *See* 18 U.S.C. § 1962(c) (making it unlawful to "conduct [an] enterprise's affairs through a pattern of racketeering activity"); *Salinas*, 522 U.S. at 62 (elements are (1) conduct, (2) enterprise and (3) pattern) (citation omitted); *cf. Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chi.*, 747 F.2d 384, 402 (7th Cir. 1984) (Cudahy, J.) (language of § 1962(c) designating "person" and "enterprise" as distinct elements "suggests that the liable person and the enterprise must be separate"), *aff'd on other grounds*, 473 U.S. 606 (1985).

Structure is also implied in the text of § 1961(4),[15] which defines "enterprise" to include two types of entities: "any individual, partnership, corporation, association, or other legal entity," as well as "any union or group of individuals associated in fact although not a legal entity." The repetition of "entity" (Ans. 16), a term connoting structure (Br. 26-27), indicates that the salient difference between the two enterprise categories is their legal or non-legal status, and that they are otherwise similar in nature; *i.e.*, that the entities listed in the second clause – including associations-in-fact – should have a structure approximating those in the first. *See Turkette*, 452 U.S. at 583 (enterprise must have actual "existence" as "an entity separate and apart from the pattern"); *Limestone,* 520 F.3d at 804-05 ("'associated-in-fact' just means structured without the aid of legally defined structural forms such as the business corporation"). Augmenting this conclusion is the presence of labor unions in the second clause – an interpretation not seriously contested by the government (Ans. 42-43) – reinforcing that the adjacent phrase "associated in fact" contemplates an equivalent degree of structure. *See* Br. 42-44.

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[15] *See NOW*, 510 U.S. at 260 (suggesting that appropriate "requirement[s]" may be "fairly implied" in RICO's "operative

(continued...)

In contrast, punctuating the phrase "group of individuals associated in fact" while glossing over the ensuing qualifier (Ans. 17) – "although not a legal entity" – reads § 1961(4) out of context and again "truncates" the second clause "misleadingly."

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[15](...continued)
sections").

Limestone, 520 F.23d at 804; *cf.* Ans. 38 (purporting to recognize that statutory language must be "read in context") (citations and internal quotes omitted). Indeed, in the absence of structure, there is *no* "resulting entity" (*id.* 17) – legal or otherwise – when individuals merely associate together in a group without more. *See* Br. 26-27 (explaining that "entity" is defined as an independent being existing apart from its attributes and properties: here, the individuals forming the association and the acts they commit).

A structure requirement is also implicit in, if not compelled by, the holding of *Turkette*. As discussed in **POINT II**, the government defines "enterprise" primarily by reference to a group of individuals associated for a "common purpose," and secondarily, if at all, to their "function[ing] as a continuing unit," *Turkette*, 452 U.S. at 583 – language as absent from RICO's text as the word "structure." Yet, at the same time, the government backs a jury instruction that gave no effect to the rest of *Turkette*'s operative passage, requiring "an entity separate and apart from the pattern." *Id.* (further requiring an "ongoing organization," which, as the government points out (Ans. 38), also appears nowhere in §§ 1961(4) or 1962(c)). Again, the government cannot have it both ways.

Despite RICO's breadth and liberal construction clause, this Court has imposed other interpretive constraints (beyond *Turkette's* ongoing organization, separate entity, common purpose and continuing unit tests) where, as here, they are (A) logically inferred from the statutory language; (B) consistent with RICO's history, purpose and policy; and/or (C) dictated by settled construction canons. *See supra* n.15. Most prominently, a § 1962(c) violation requires proof that the predicate acts are related and continuous, *H.J.*, 492 U.S. at 239, and that the defendant participated in operating or managing the enterprise, *Reves*, 507 U.S. at 179[16] – criteria not strictly found within RICO's four corners. *See also, e.g., Holmes v. Sec. Inv. Protection Corp.*, 503 U.S. 258 (1992) (reading proximate cause requirement into 18 U.S.C. § 1964(c)); *Beck v. Prupis,* 529 U.S. 494, 504 (2000) (inferring tortious-type injury requirement to hold that civil RICO conspiracy entails acts of racketeering or that are independently wrongful). Structure is no different.[17]

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[16] That lower-rung participants may help operate an enterprise under *Reves* (Ans. 39-40 & n.11) is both undisputed and beside the point: namely, that the very notions of an operation and management test and an organizational ladder presume the existence of a structured entity capable of being operated and managed. Br. 31-34.

[17] Indeed, this Court routinely interprets statutes in ways consistent with their language but beyond the literal terms of their text. *See, e.g., Scheidler v. Nat'l Org. For Women, Inc.*, 537 U.S. 393 (2003) (finding wrongful acquisition of property implicit in Hobbs Act extortion definition); *Staples v. United States*, 511 U.S. 600, 605 (1994) (importing *scienter* requirement even though 26 U.S.C. § 5861 "silent concerning [ ] *mens rea*"); *Ernst & Ernst v.*

(continued...)

As mentioned, construing §§ 1961(4) and 1962(c) to make every pattern of racketeering an *ipso facto* association-in-fact enterprise (Ans. 27) is "absurd" – a result "to be avoided." *Turkette*, 452 U.S. at 580. Conversely, a structure requirement ensures jury consideration of the enterprise as an element "separate and apart from the pattern," *id.* at 583, vindicating RICO's federal interest in eradicating coordinated, highly dangerous activity evading conventional prosecution.

IV. ASSOCIATIVE ENTERPRISES MAY BE STRUCTURED FORMALLY OR INFORMALLY

Contrary to the government's supposition (Ans. 10, 12, 18, 28, 40, 43), we do not contend that an association-in-fact enterprise must have a formal structure. Indeed, *Turkette* itself establishes that the organization may be "formal or informal." 452 U.S. at 583. That is a "very low hurdle." *Korando*, 29 F.3d at 1117. It merely requires "some structure" beyond the participants' predicate acts – but not "much" – to distinguish the enterprise from the pattern. *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992) (Posner J.). To reiterate Judge Posner's textual analysis,

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[17](...continued)
Hochfelder, 425 U.S. 185 (1976) (engrafting civil *scienter* requirement over government objection that Securities Act § 10(b) not expressly restricted to knowing or intentional practices).

"'associated-in-fact' just means structured without the aid of legally defined structural forms such as the business corporation." *Limestone*, 520 F.3d at 804-05 (parsing 18 U.S.C. § 1961(4)).

That is a far cry from a full-blown or backdoor organized crime requirement. *Compare* Ans. 43-46 *with, e.g.,* Br. 2-3, 14-16, 54, 58. Yet it also comports with "the existence of enterprises that pursue entirely illicit goals." Lynch at 974; *see* Br. 41 n.28 and cases cited. And as a "low hurdle," *Korando*, 29 F.3d at 1117, the structure requirement is not "complex" (NASCAT Br. 8; *cf. infra* **POINT V**) – a legally invalid objection in any event. *See* Br. 62-63 n.52. After all, seven circuits apply some kind of structure test, and at least four incorporate variants in their jury instructions, without "discernible mischief" in RICO's administration. *Kushner*, 533 U.S. at 162; *see* Br. 15 n.11, 20; *supra* 2-3. In fact, the government is already proving structure in the lion's share of cases. Br. 58-63 & n.2. And if it can't carry that light burden, then RICO shouldn't be invoked, as the predicate crimes – including white-collar crimes and other frauds – are independently punishable under state and/or federal law. Br. 36-37 n.23, 62-63 n.52.

The government wrongly suggests that RICO's inclusion of a single "individual" as a potential enterprise belies any structure requirement. Ans. 12, 20-21, 41-42, 44. But individuals, meaning "sole proprietorship[s]" as used in RICO,[18] are legal entities under § 1961(4)'s first clause ("individual, partnership, corporation, association, or other legal entity"). By hypothesis, legal entities have formal legal structures separate from any racketeering activity in which they engage. *Cf. Kushner*, 533 U.S. at 165 (corporate form distinguishes business enterprise from sole shareholder defendant). At issue, however, is whether *nonlegal* entities under § 1961(4)'s *second* clause ("union or group of individuals associated in fact although not a legal entity") require a separate structure, formal or informal. And even if individuals/sole proprietorships lacked inherent structure as legal entities, the clauses describe "separate type[s] of enterprise[s]," *Turkette*, 452 U.S. at 582, and enterprise can mean different things in different contexts. *See NOW*, 510 U.S. at 258-59.[19]

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[18] Blakey & Gettings, "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts – Criminal and Civil Remedies," 53 Temp. L.Q. 1009, 1023 n.81 (1980). *Cf. Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992); *McCullogh v. Suter*, 757 F.2d 142, 143 (7th Cir. 1985) (Posner, J.); 18 U.S.C. § 1961(3) (contrasting "person" with "individual") (internal quotation marks omitted).

[19] The hypothetical at pages 26-27 of the government's brief is inapposite on its face. It does not posit a "group of individuals associated in fact," 18 U.S.C. § 1961(4) – whether established by the pattern or otherwise – and there is no dispute that a properly instructed jury *could* find a pattern without necessarily finding an enterprise. *See supra* 13-15. At issue is whether Boyle's jury *was*

(continued...)

Similarly, the government's claim that the prospect of two-member enterprises undermines any structure requirement (Ans. 12, 20) mistakenly assumes the structure must be "formalistic." *Id.* 12; *contra supra* 24-25. In fact, two-person associations may be structured in any number of informal ways, either generally (*e.g.*, copartners; leader/subordinate; first among equals; mentor/apprentice; principal/agent; beneficiary/nominee) or specifically, through fixed roles extending over time (*e.g.*, buyer/seller; importer/exporter; wholesaler/retailer; supplier/distributor; briber/recipient; thief/fence; triggerman/wheelman; steerer/swindler; tipper/tippee; pimp/prostitute; recruiter/alien smuggler; issuer/broker; trafficker/launderer; loan shark/collector, *etc*). The possible configurations are many and varied. *See, e.g., United States v. Nabors*, 45 F.3d 238, 240-41 (8th Cir. 1995) (structured enterprise distinct from pattern properly alleged even if comprised solely of two named defendants); *Crowe v. Henry*, 43 F.3d 198, 204-05 (5th Cir. 1995) (structured two-person enterprise existing separate and apart from pattern); *American Mfrs. Mut. Ins. Co. v. Towson*, 912 F. Supp. 291, 295-96 (E.D. Tenn. 1995) (association-in-fact marital enterprise); *cf.*

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[19](...continued)
properly instructed. And as demonstrated in our opening brief and throughout this reply, the answer is "no." *Cf. United States v. Korfant*, 771 F.2d 660, 663 (2d Cir. 1985) (participation of single "common actor" does not establish conspiracy) (citations omitted), *overruled on other grounds*, *United States v. Calderone*, 917 F.2d 717 (2d Cir. 1990).

Reves, 507 U.S. at 184 (enterprise might be operated covertly or horizontally, not just vertically, by illicit means like bribery). The distinction between such structured enterprises and those lacking structure, however subtle, still differentiates the two, promoting separate jury consideration of all essential elements.[20]

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[20] The supposed "anomal[y]" conjured by *amicus* – a structure requirement would exclude "large [heroin] operation[s]" but arguably not "small-time criminals jointly [and infrequently selling] drugs" and guns – is illusory and misdirected, having nothing to do with structure. NASCAT Br. 27-28 (quoting *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir. 1983)) (internal quotation marks omitted). It rests, instead, on the faulty premise – subsequently discredited in *H.J.*, 492 U.S. at 240-41 & n.3 – that a RICO pattern requires proof of multiple schemes. Since an enterprise may be wholly criminal, *Turkette*, 452 U.S. at 580-81, and a single scheme or purpose will suffice, a structured heroin operation or other narcotics organization is a textbook association-in-fact, falling squarely within RICO's heartland. *See, e.g.*, *United States v. Jones*, 482 F.3d 60, 69-70 (2d Cir. 2006).

Nor will a structure requirement thwart RICO political corruption prosecutions. NASCAT Br. 29-31. Criminal penetration of governmental units was among RICO's core concerns. And, like the legal entities previously discussed, government enterprises will always have a structure independent of any predicate acts committed – the kind of structure illicit associations-in-fact should loosely resemble. *See generally* Br. 53-58.

V. A SEPARATE STRUCTURE TEST IS SIMPLE, STRAIGHTFORWARD AND EASY TO APPLY

"Structure" is not amorphous, indefinite or vague, Ans. 12, 14, 22-23, 50; merely saying it does not make it so. Rather, structure is a plain English word, self-defining and readily understood. Requiring a structured enterprise distinct from the predicate acts is no more "ambiguous" or imprecise, *id.* 14, 50, than the other RICO criteria identified by this Court: a separate entity existing as an ongoing organization, with a common purpose and a continuing unit of associates, *Turkette*, 452 U.S. at 583; a related and continuous pattern of predicate acts, *H.J.*, 492 U.S. at 239; participation in the enterprise's operation and management, *Reves*, 507 U.S. at 179, *etc.* Properly instructed juries have applied those factors with no apparent problem; nothing suggests that structure will prove any harder. Indeed, juries are called upon to make far more complicated factual determinations in a variety of contexts, including tax, antitrust, money laundering and securities cases.[21]

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[21] *See, e.g.*, *Boulware v. United States*, 128 S. Ct. 1168, 1173-74 (2008) (jury must evaluate the existence of earnings and profits to assess the consequences of a corporate distribution to its shareholder and determine whether a tax deficiency exists); *United States v. Santos*, 128 S. Ct. 2020 (2008) (jury must ascertain whether gambling business generated net profits, over and above gross receipts, to determine if money laundering violation exists);

(continued...)

The government shows too little faith in jurors[22]; there is simply no reason to believe that a structure requirement will be any more difficult than any other requirement they are regularly asked to apply. The cases cited in the government's own brief illustrate that jurors instinctively grasp the concept of structure and have little trouble either applying the test or returning convictions. Ans. 32-33.

Although a universal definition of "enterprise" is elusive – precisely because of RICO's intended versatility, *id.* 24 – its existence is a question of fact for a jury properly instructed[23] that the enterprise must have a structure "separate from the commission of the predicate acts themselves." *Korando*, 29 F.3d at 1118 (internal quotation marks omitted). The instruction can (but need not) be supplemented with appropriate

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[21](...continued)
Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005) (elements of Securities Act § 10(b) violation include (1) material misrepresentation or omission; (2) scienter; (3) connection with stock purchase or sale; (4) reliance; (5) economic loss; (6) causal connection between loss and material misrepresentation); *Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (elements of Sherman Act § 2 antitrust offense include monopoly power in relevant market and anticompetitive conduct).

[22] *Contra Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[23] *See, e.g., United States v. Pelullo*, 964 F.2d 193, 211 (3d Cir. 1992).

examples in particular cases, indicating that the requisite structure may be shown by factors including:

- hierarchy, *United States v. Chong*, 419 F.3d 1076, 1080-81 (9th Cir. 2005); *contrast* JA 45 ("no organization at all") (testimony of Christopher Ludwigsen a.k.a. Paciello); 47 ("no leadership") (Paciello), 79 (no leaders or organization) (testimony of Gerard Bellafiore);

- division of labor or role differentiation, *United States v. Lemm*, 680 F.2d 1193, 1999-2000 (8th Cir. 1982) (arson-for-profit ring with specific participants serving as property finder, insurance adjuster, real estate financier);

- unique *modus operandi*, *Bledsoe*, 674 F.2d at 666;

- framework for making decisions and chain of command for carrying them out, *United States v. Riccobene*, 709 F.2d 214, 222, 224 (3d Cir. 1983) (overseeing, "clearinghouse and coordination function"; mechanism "for controlling and directing [group] affairs" on ongoing rather than *ad hoc* basis);

- professionalism and sophistication of organization, and diversity and complexity of crimes, *Turkette*, 452 U.S. at 579; *United States v. Torres*, 191 F.3d 799, 807 (7th Cir. 1999);

- membership dues, rules and regulations, *United States v. Mejia*, 545 F.3d 179, 183 (2d Cir. 2008); *United States v. Feliciano*, 223 F.3d 102, 107, 109-10, 114, 116 (2d Cir. 2000); *contrast* JA 83 (no group "requirements") (Bellafiore); *cf. Limestone*, 520 F.3d at 804 ("Chicago Vice Lords would be embarrassed to have so little structure") (citation omitted);

- longevity, *Korando*, 29 F.3d at 1119;

- coherent existence in "intervals" between predicate acts, *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985), "independent of the[ ] individual crimes," *United States v. Richardson*, 167 F.3d 621, 625 (D.C. Cir. 1999); *see also Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1462 (5th Cir. 1991); *contrast* JA 45 ("Each individual crime withstood by itself") (Paciello), 83 (similar) (Bellafiore), 47 ("it was just who was available to do the crime when it came up") (Paciello), 74-75 (similar) (Bellafiore);

- uncharged or additional crimes aside from predicate acts, *United States v. Leisure*, 844

F.2d 1347, 1363 (8th Cir. 1988) ("concerted attempt to gain control of [ ] local unions, which can be viewed in complete isolation from the group's pattern of racketeering activity");

- internal discipline mechanism, *Jones*, 482 F.3d at 70; *United States v. Pimentel*, 346 F.3d 285, 288-89 (2d Cir. 2003) ("strict rules of behavior that are brutally enforced");

- enterprise "name," *United States v. White*, 116 F.3d 903, 924 (D.C. Cir. 1997), "sense of belonging" and self-identification as members, *United States v. Nascimento*, 491 F.3d 25, 33 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008); *contrast* JA 59 (no group name) (Bellafiore), 86 (same) (testimony of Blas Salvatore "Fat Sal" Mangiavillano), 94 (Mangiavillano "[n]ever heard the name The Boyle Crew");

- regular meetings regarding enterprise affairs, *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001) (gang "had 'sessions' where important decisions were made"); *United States v. Smith*, 413 F.3d 1253, 1268 (10th Cir. 2005) ("weekly meetings, even when some members were incarcerated"); *contrast* JA 76, 83-84 (no regular meetings) (Bellafiore);

- reinvestment of proceeds to promote and expand the enterprise, *Tillett*, 763 F.2d at 632 (jointly purchased trucks, smuggling boat and other equipment); *Torres*, 191 F.3d at 807 ("well-equipped, sophisticated group"); *contrast* JA 60, 66 (commercial hardware, Radio Shack electronics; no evidence jointly purchased, with or without enterprise proceeds) (Bellafiore);

- revenue sharing and financial contributions, *United States v. Kragness*, 830 F.2d 842, 857 (8th Cir. 1987) (members of "organization made investments in its criminal future" to purchase assets "used repeatedly over the course of a number of criminal episodes");

- joint property ownership, *United States v. Darden*, 70 F.3d 1507, 1520-21 (8th Cir. 1995) ("stash pad" to store drugs and firearms);

- protection of enterprise members, property, activities and territory, *United States v. Davidson*, 122 F.3d 531, 535 (8th Cir. 1997) ("numerous acts of retaliation and intimidation"); *Jones*, 482 F.3d at 69-70; *Smith*, 413 F.3d at 1267-68;

- mechanisms to avoid detection and prosecution, *Masters*, 924 F.2d at 1367;
- payment of members' legal fees, *United States v. Simmons*, 923 F.2d 934, 949 (2d Cir. 1991); *contrast* JA 81-82 (no such obligation) (Bellafiore); and/or
- induction or initiation ceremonies and rituals, *United States v. Yannotti*, 541 F.3d 112, 122 (2d Cir. 2008).

Few if any of these factors were present in Boyle's case. Even the government's account of the facts discusses only the charged pattern of racketeering, essentially conceding the absence of a separate structure. Ans. 2-6. And the account itself is significantly overdrawn. By its special verdict, the jury found that Boyle participated in a narrow enterprise that committed three discrete bank burglaries from Dec. 1998 to Jan. 1999 – in New York, New Jersey and Wisconsin – based solely on the testimony of cooperating witness Bellafiore. Def. COA Br. 8; Def. COA App. 834; JA 51. The jury found no other proven predicate acts, apparently declining to credit the supporting testimony of the remaining two cooperators, Mangiavillano and Paciello, who, notably, had nothing to do with 1998-99 bank burglaries. JA 43, 49 (Paciello met Boyle twice in 1994 and never saw him again); T:816-19, JA 89 (Mangiavillano allegedly burgled only one night deposit box with Boyle, in 1996, uncharged and never passed on by any jury).

Because the evidence failed to establish a structured enterprise separate and apart from the three proven predicate acts – showing only a clutch of bank burglars dividing their loot – Boyle's conviction must be vacated and the RICO counts dismissed. *See* Br. 71 and cases cited; *cf. Santos*, 128 S. Ct. at 2026-27 (plurality opinion) (rejecting interpretation of 18 U.S.C. § 1956 whereby "any wealth-acquiring crime with multiple participants would become money-laundering when the initial recipient of the wealth gives his confederates their shares") (footnote omitted). Alternatively, because a properly instructed jury surely could have refused to find a separate structured enterprise, Boyle is entitled to a new trial, or at least a remand to the Second Circuit to conduct harmless error analysis. *See* Br. 71; *Hedgpeth v. Pulido*, 129 S. Ct. 530, 532-33 (2008) (*per curiam*).

CONCLUSION

For the reasons stated here and in our opening brief, the Second Circuit's judgment should be vacated.

Dated: New York, New York
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AMICUS
CURIAE
BRIEF

113 ⑥

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IN THE
Supreme Court of the United States

EDMUND BOYLE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BOTH 47N95I

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

- I. RICO REQUIRES THAT AN "ENTERPRISE" HAVE AN ASCERTAINABLE STRUCTURE DISTINCT FROM THE UNDERLYING CRIMINAL CONDUCT 6
  - A. *Turkette* Requires That A RICO Enterprise Be Distinct From The Pattern Of Racketeering Activity In Which It Engages 7
  - B. The Jury Instruction In This Case Improperly Conflates The Elements Of "Enterprise" And "Pattern Of Racketeering Activity" 9
  - C. Decisions Finding That An "Enterprise" Does Not Require Ascertainable Structure Are Not Persuasive 14
- II. AN OVERLY BROAD READING OF RICO'S "ENTERPRISE" REQUIREMENT WOULD UPSET THE BALANCE BETWEEN STATE AND FEDERAL LAW ENFORCEMENT 17
  - A. The Absence Of An Ascertainable Structure Requirement Enables Federal Prosecutors To Prosecute Crimes That Ordinarily Fall Within The Purview Of State Authorities 17

B. Prosecuting An "Enterprise" Defined Solely By State Criminal Activities Is Inconsistent With Basic Principles Of Federalism 20

C. The Court Should Preserve A Meaningful "Enterprise" Requirement To Avoid Expanding The Scope Of Federal Criminal Jurisdiction Without Express Congressional Sanction 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Brecht v. Abrahamson, 507 U.S. 619 (1993) 20

Cleveland v. United States, 531 U.S. 12 (2000) 25

Ewing v. California, 538 U.S. 11 (2003) 21, 22

Jones v. United States, 529 U.S. 848 (2000) 25

Limestone Dev. Corp. v. Village of Lemont, 520 F.3d 797 (7th Cir. 2008) 10

Moss v. Morgan Stanley Inc., 719 F.2d 5 (2d Cir. 1983) 14

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007) 15, 16

Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) 25

Rewis v. United States, 401 U.S. 808 (1971) 23, 26

Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995) 16

Russello v. United States, 464 U.S. 16 (1983) 13

Summit Props. Inc. v. Hoechst Celanese Corp., 214 F.3d 556 (5th Cir. 2000) 22

United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) 12

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983) 15

United States v. Bass, 404 U.S. 336 (1971) 4, 17, 23, 24, 25, 26, 27

United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982) 11

United States v. Carillo, 229 F.3d 177 (2d Cir. 2000) 20

United States v. Crosby, 20 F.3d 480 (D.C. Cir. 1994) 20

United States v. Elliott, 571 F.2d 880 (5th Cir. 1978) 14

United States v. Enmons, 410 U.S. 396 (1973) 26

United States v. Goodwin, 457 U.S. 368 (1982) 25

United States v. Johnson, 440 F.3d 832 (6th Cir. 2006) 11

United States v. Lopez, 514 U.S. 549 (1995) 20, 22

United States v. Lorenzo, 995 F.2d 1448 (9th Cir. 1993) 24

United States v. Martino, 648 F.2d 367 (5th Cir. 1981) 19

United States v. Masters, 924 F.2d 1362 (7th Cir. 1991) 10, 15

United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986) 10

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001) 14, 15

United States v. Perholtz, 842 F.2d 343 (D.C. Cir. 1988) 14, 16

United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983) 11, 16, 21

United States v. Sanders, 928 F.2d 940 (10th Cir. 1991) 11

United States v. Tillett, 763 F.2d 628 (4th Cir. 1985) 11

United States v. Turkette:

632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981) 7

452 U.S. 576 (1981) 2, 3, 4, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 19, 27, 28

Wayte v. United States, 470 U.S. 598 (1985) 24, 25

STATUTES AND RULES

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 12

§ 1:

84 Stat. 922 12

84 Stat. 923 12

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* 1

18 U.S.C. § 1961(1)(A) 18, 19

18 U.S.C. § 1961(4) 3, 6, 8, 9, 20

18 U.S.C. § 1961(5) 18

18 U.S.C. § 1962(a) 12

18 U.S.C. § 1962(b) 12

18 U.S.C. § 1962(c) 2, 6, 8

18 U.S.C. § 1962(d) 7

18 U.S.C. § 1963(a) 21

18 U.S.C. § 1964 21

18 U.S.C. § 1964(a) 12

Travel Act, 18 U.S.C. § 1952 26

18 U.S.C. § 2113(a) 19

N.Y. Penal Law:

§ 70.00(2)(d) 21

§ 140.20 21

Sup. Ct. R. 37.6 1

ADMINISTRATIVE MATERIALS

Hon. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* (Jan. 1999), *available at* http://www.uscourts.gov/ttb/jan99ttb/january1999.html 23

United States Dep't of Justice, *United States Attorneys' Manual* (1997) 24

OTHER MATERIALS

Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920 (1987) 13, 14

INTEREST OF *AMICUS CURIAE*[1]

Amicus Center on the Administration of Criminal Law is dedicated to defining and promoting best practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention to how prosecutors exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decision-making. The Center's litigation program aims to bring the Center's empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts, at all levels. The Center focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues.

The Center files this *amicus* brief out of concern that the government has interpreted provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") to grant individual prosecutors nearly unfettered discretion to alter the balance between state and federal criminal prosecutions. RICO criminalizes the association with and participation in the conduct of an enterprise that engages in a series of defined federal and state crimes. Because these underlying "predicate acts" may be comprised solely of state crimes, RICO significantly expands the federal government's criminal jurisdiction and the power of federal prosecutors. That expansion is typically justified by the federal interest in eliminating organized crime. The decision under review, however, does away with any meaningful "enterprise" requirement under RICO, allowing the existence of criminal activity – including exclusively state-law crimes – to establish the existence of an "enterprise." That interpretation significantly alters the balance of federal and state law enforcement and improperly expands the prosecutorial jurisdiction of federal prosecutors. The Court should therefore limit that expansion by holding that proof of an ascertainable structure is necessary to a finding that the "enterprise" element of a RICO violation has been met.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

The court of appeals upheld petitioner's conviction under RICO, despite the district court's refusal to instruct the jury that a RICO "enterprise" must have "an ascertainable structural hierarchy distinct from the charged predicate acts." JA 95. In so doing, the court of appeals effectively merged the elements of "enterprise" and "pattern of racketeering activity" under the statute. *See* 18 U.S.C. § 1962(c). The court of appeals' ruling that the jury did not have to find an ascertainable structure to satisfy the "enterprise" element of the statute thus conflicts with this Court's holding in *United States v. Turkette*, 452 U.S. 576 (1981), that a RICO enterprise "is an entity separate and apart from the pattern of [racketeering] activity in which it engages." *Id.* at 583. It criminalizes conduct that does not implicate the significant *federal* interest in combating organized crime that underlies RICO. And it threatens to upset the balance between state and federal prosecutions that Congress drew when it included the requirement of "enterprise" as an element of the RICO offense.

I. In *Turkette*, this Court held that, to give effect to each element of the RICO statute, a RICO "enterprise" must be distinct from the "pattern of [racketeering] activity in which it engages." 452 U.S. at 583. The Court reasoned that an "enterprise" is an entity, whereas a "pattern of . . . activity" is a series of acts. The Court held that the existence of an "enterprise" could be proven through evidence of an "ongoing organization" that functioned as a "continuing unit." *Id.*

"[L]egal" entities are distinct from their activities by operation of law. When an enterprise is alleged to be an "associat[ion] in fact although not a legal entity," 18 U.S.C. § 1961(4), the government must still prove that the enterprise has an existence independent of its activities. Otherwise, the "enterprise" requirement would be effectively read out of the statute. That proof must take the form of some *structure* separate from the enterprise's activities.

The requirement that an enterprise have an ascertainable structure comports with the Court's guidance that enterprises must be ongoing organizations and continuing units. Indeed, the majority of circuits to have considered the question have concluded that *Turkette* requires proof of ascertainable structure. The requirement of structure also reflects Congress's core concern in enacting RICO – the elimination of criminal organizations that pose a threat that transcends the specific predicate acts in which they engage. The contrary view – that the government need prove no more than that a group of individuals engaged in a pattern of racketeering activity to satisfy the element of "enterprise" under RICO – is not persuasive, because it fails to distinguish between the finding that a properly instructed jury must make – that an enterprise has structure – and the evidence that may support such a finding, which may include evidence of the enterprise's activities.

It is not necessary to conclude that associations-in-fact must have the *same* structure as business organizations in order to find that they still have *some* ascertainable structure. The courts of appeals that have implemented a requirement of structure have applied that term flexibly, finding structure in a wide variety of mechanisms for coordinated action and decision-making.

II. Principles of federalism provide a further reason why this Court should not weaken the distinction set forth in *Turkette*. The Second Circuit's interpretation would improperly extend federal authorities' broad discretion to prosecute state crimes. As this Court has repeatedly affirmed, however, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). No such clear statement can be found here.

When Congress enacted RICO, it recognized that it was substantially expanding federal prosecutorial power, but it limited the exercise of that power to circumstances in which the criminal acts were carried out as part of an "enterprise." The intent to combat such criminal *organizations* lies at the core of the federal interest animating the RICO statute. If that element can be proven by the "pattern of racketeering activity" standing alone, then the necessity of a distinct enterprise collapses. Because state crimes may comprise RICO predicate acts, it would be possible to prosecute under RICO multiple acts of state criminality by loosely grouped individuals without the special circumstance – an "enterprise" – that implicates the federal interest.

Such prosecutions would threaten core principles of federalism and this Court's consistent understanding that the States enjoy a historical sovereignty over the enforcement of the criminal law. First, prosecutions of state crimes under RICO committed by groups lacking structure could impose a penalty far different from that which the State would impose, undermining local policy judgments. Second, such prosecutions would blur the lines of democratic accountability between the state and federal governments, making it harder for citizens to give effect to their preferences about criminal enforcement. Finally, such prosecutions would create the possibility of significant misallocations of judicial and law enforcement resources to prosecute at the federal level crimes better handled by local authorities. These concerns take on special prominence in light of the broad discretion federal prosecutors enjoy. That discretion means that important decisions about the boundary between federal and state law enforcement are pushed even farther from politically accountable actors.

For those reasons, the Court should reject an interpretation of "enterprise" that would result in such sweeping changes absent explicit congressional sanction. This Court should reverse the court of appeals and hold that the government must prove an enterprise with "ascertainable structure" to sustain a conviction under RICO.

ARGUMENT

I. RICO REQUIRES THAT AN "ENTERPRISE" HAVE AN ASCERTAINABLE STRUCTURE DISTINCT FROM THE UNDERLYING CRIMINAL CONDUCT

Section 1962(c) of RICO makes it "unlawful" for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). In turn, the statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity" or, as relevant here, "any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

Petitioner in this case asked the district court to instruct the jury that a RICO "enterprise" must have "an ascertainable structural hierarchy distinct from the charged predicate acts." JA 95. The district court rejected that instruction. JA 112. Instead, the district court instructed the jury that it "may find an enterprise where an association of individuals, *without structural hierarchy*, forms solely for the purpose of carrying out a pattern of racketeering acts," and that "it is not necessary that the enterprise have *any particular or formal structure*." *Id.* (emphases added). The court of appeals affirmed.

Under the district court's instruction, the meaning of "enterprise" merges with the "pattern of racketeering activity" in section 1962(c). The instruction therefore runs afoul of this Court's holding in *United States v. Turkette*, 452 U.S. 576 (1981), that "[t]he 'enterprise' . . . is an entity *separate and apart from* the pattern of [racketeering] activity in which it engages." *Id.* at 583 (emphasis added). Petitioner's proposed jury instruction correctly states the law. This Court should reverse.

A. *Turkette* Requires That A RICO Enterprise Be Distinct From The Pattern Of Racketeering Activity In Which It Engages

In *Turkette*, this Court interpreted "enterprise" in the RICO statute in a manner that forecloses the jury instruction approved by the district court and the court of appeals in this case. The defendant in *Turkette* was convicted of conspiracy to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of section 1962(d). *See* 452 U.S. at 578-79. The indictment alleged that Turkette and other individuals were associated with each other for the purpose of carrying out a number of criminal acts. *See id.* The evidence at trial "focused upon . . . the professional nature of this organization." *Id.* at 579.

The court of appeals dismissed the indictment because, in its view, an "enterprise" under RICO could only be a "legitimate" organization, rather than a "group[] of individuals who engage in a pattern of exclusively criminal racketeering activity." *United States v. Turkette*, 632 F.2d 896, 899 (1st Cir. 1980). The court reasoned, in part, that an exclusively criminal organization would in fact be nothing more than a "pattern of racketeering activity." For such organizations, therefore, separate proof of the element of "enterprise" would be superfluous. The court therefore concluded that criminal organizations could not be enterprises within the meaning of the statute. *See id.*

This Court reversed. The Court rejected the First Circuit's "faulty premise" that to give effect to each of the elements of the crime in section 1962(c) required the exclusion of wholly criminal organizations from "the ambit of the statute." *Turkette*, 452 U.S. at 583. Instead, the Court gave meaning to each element of the statute by holding that an "enterprise" must always have an existence separate and distinct from *any* activities – licit or illicit – in which it engaged. *See id.* As the Court stated: "The enterprise is an *entity*, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal *acts* as defined by the statute." *Id.* (emphasis added); *see also* 18 U.S.C. § 1961(4) (defining "enterprise" as any "legal entity" or "associat[ion] in fact although not a legal entity").

Based on the statutory premise that an "enterprise" "is an entity separate and apart from the pattern of activity in which it engages," 452 U.S. at 583, the Court made several additional observations about the evidence that could be used to prove the existence of such an entity. Thus, although the "pattern of racketeering activity" could be proved solely through evidence of those acts, to establish the existence of an "enterprise," the government had to offer "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *Id.* The Court was careful to note that, although the evidence offered to prove the elements "may in particular cases coalesce," proof of the pattern of racketeering activity "does not necessarily" prove the existence of the enterprise. *Id.*

B. The Jury Instruction In This Case Improperly Conflates The Elements Of "Enterprise" And "Pattern Of Racketeering Activity"

1. *Turkette* therefore establishes, consistent with the statutory definition of "enterprise," *see* 18 U.S.C. § 1961(4), that a RICO "enterprise" must be an "entity" separate and distinct from its activities. That characteristic is easily demonstrated by "legal entit[ies]." *Id.* Corporations, partnerships, and other such associations are granted independent status under the law. They are entities distinct from their activities because the law affirmatively confers that status.

A non-legal entity or association-in-fact, broadly speaking, can be defined by what it is or what it does. *Turkette* holds, however, that a pattern of racketeering activity, standing alone, is insufficient to constitute the relevant entity, or "enterprise," for the purpose of the RICO statute. Rather, an "enterprise" must be defined by more than simply the racketeering acts in which it engages. Otherwise, the "enterprise" requirement is effectively read out of the statute: all that is required for liability is a "pattern of racketeering activity." Therefore, in cases where the only concerted activities of a group of individuals are the crimes that constitute the pattern of racketeering activity, the jury must make some additional finding by inference or direct proof to establish the existence of an "enterprise."

That additional finding must be that the enterprise has a *structure*. The enterprise cannot be defined by what it does; it must be defined by what it *is* – an *organization* with an ascertainable *structure*. This Court's own examples of the elements of proof that may demonstrate an enterprise – "ongoing organization" and a "continuing unit," *Turkette*, 452 U.S. at 583, both suggest the need for some ascertainable structure. An association could not "continu[e]" to exist, nor could it in any way be "organiz[ed]," without an element of structure.

In approving a jury instruction that relieved the government of the burden of proving any structure, the court of appeals ran afoul of the key holding in *Turkette* and allowed the jury to find proof of an enterprise from its racketeering activities alone.

2. The majority of circuit courts have properly understood that *Turkette* imposes a requirement of ascertainable structure upon associated-in-fact RICO enterprises. The Seventh Circuit, relying on *Turkette*, has reasoned that, "[i]f the 'enterprise' is just a name for the crimes the defendants committed, . . . then it would not be an enterprise within the meaning of the statute" and "two statutory elements – enterprise and pattern – would be collapsed into one." *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991) (Posner, J.). Instead, that court required proof "that the informal enterprise . . . existed as an organization with a structure and goals separate from the predicate acts themselves." *Id.*; *see also Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 804-05 (7th Cir. 2008) (Posner, J.) ("'[A]ssociated in fact' just means structured without the aid of legally defined structural forms such as the business corporation."); *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) (holding that "the central element of an enterprise is structure" and that "Congress intended the phrase 'a group of individuals associated in fact although not a legal entity' . . . to encompass only an association having an ascertainable structure"). Similarly, the Eighth Circuit has held that, "under RICO, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." *United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982). Instead, that court "requires proof of some structure separate from the racketeering activity." *Id.* And, in *United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983), the Third Circuit interpreted this Court's statements that an enterprise requires an "ongoing organization" and "continuing unit" to mean that the enterprise must have structure. *See id.* at 222 ("The 'ongoing organization' requirement relates to the superstructure or framework of the group."); *id.* at 223 (explaining that the "continuing unit" requirement means "that each person perform a role in the group consistent with [its] organizational structure"); *id.* at 224 ("The function of overseeing and coordinating the commission of [racketeering activities] on an on-going basis is adequate to satisfy the separate existence requirement."). Other courts are in substantial accord. *See, e.g.*, *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) ("Evidence of the ongoing nature of the organization relate[s] to the operational structure of the group."); *United States v. Johnson*, 440 F.3d 832, 840 (6th Cir. 2006) (finding an "enterprise" where evidence suggested "a hierarchical decision-making structure and a division of labor among the various players"); *United States v. Sanders*, 928 F.2d 940, 944 (10th Cir. 1991).

3. The conclusion that the "enterprise" element of the RICO statute requires proof of an ascertainable structure draws additional support from the other uses of the term "enterprise" in the RICO statute.

Section 1962(a) prohibits the use of unlawful income in the "acquisition of any interest in, or the establishment or operation of, any enterprise" that affects interstate or foreign commerce. 18 U.S.C. § 1962(a). Similarly, section 1962(b) refers to the "acqui[sition] or maint[enance], direct[] or indirect[], [of] any interest in or control of any enterprise." *Id.* § 1962(b). Finally, section 1964(a), which imposes civil liability for RICO violations, refers to the divestment of an interest in an enterprise and the "dissolution or reorganization of any enterprise." *Id.* § 1964(a). Each of these provisions reflects Congress's understanding that a RICO "enterprise" would have an ascertainable structure and existence apart from the predicate acts themselves. These provisions reinforce the conclusion that Congress understood that an "enterprise" must be an entity in which one could have an "interest" or which one could "control." The requirement of ascertainable structure gives effect to that understanding and makes the statute coherent and consistent. *See, e.g., United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor.").

4. Finally, the requirement of an ascertainable structure effectuates the core congressional interest in "seek[ing] the eradication of *organized* crime in the United States." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922, 923 (emphasis added). Congress was especially concerned with the "sophisticated, diversified, and widespread" activities of organized criminals and their effect on interstate commerce and economic activity. *Id.* at 922. Criminal organizations that are more than just loosely affiliated individuals who sporadically engage in criminal activity pose special problems for law enforcement that RICO helps to solve.

As the Court noted in *Turkette*, Congress took aim primarily at the "infiltration of legitimate business by organized crime." 452 U.S. at 591. Organized criminal syndicates use their illegitimate criminal enterprises – their "primary sources of revenue and power" – as a "springboard into the sphere of legitimate enterprise." *Id.* The prosecution of highly organized criminal entities is therefore in part a "preventive" measure to prevent infiltration before it occurs. *Id.* at 593.

Nevertheless, "Congress' concerns were not limited to infiltration." *Russello v. United States*, 464 U.S. 16, 28 (1983). Rather, Congress recognized that structured criminal organizations themselves were uniquely harmful. That conviction under RICO requires proof of an "enterprise" separate and distinct from the predicate acts the participants undertake is evidence of the special opprobrium that Congress assigned to such entities. "Indeed, . . . the enterprise element constitutes the essence of the crime. Operation of a criminal organization . . . is [not] merely an incidental fact about the context in which a criminal act was committed. Rather, it constitutes a distinct species of social harm." Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 Colum. L. Rev. 920, 943 (1987). That harm arises primarily from the fact that "[o]rganized criminal groups . . . make possible the infliction of greater harm than can be committed by individuals." *Id.* at 958.

Indeed, despite the dangerous nature of the organizations themselves, structured enterprises have historically been able to avoid "mass prosecutions" by spreading their activities across jurisdictions and engaging in multi-faceted criminal conduct. *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978); *see also* Lynch, 87 Colum. L. Rev. at 929-30. RICO's focus on structure "helps to eliminate this problem by creating a substantive offense" – separate from the jurisdictionally and substantively disparate predicate acts – "which ties together these diverse parties and crimes." *Elliott*, 571 F.2d at 902.

C. Decisions Finding That An "Enterprise" Does Not Require Ascertainable Structure Are Not Persuasive

The minority view that the government need not demonstrate any ascertainable structure separate from the pattern of racketeering activities to prove the existence of a RICO enterprise not only conflicts with the central holding of *Turkette*; it is also unpersuasive on its own terms.

First, courts have misunderstood *Turkette*'s statement that "the proof used to establish the[] separate elements" of enterprise and pattern "may in particular cases coalesce," 452 U.S. at 583, to draw the further conclusion that the jury need not find an ascertainable structure. *See, e.g.*, *United States v. Patrick*, 248 F.3d 11, 18-19 (1st Cir. 2001); *United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir. 1988); *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 22 (2d Cir. 1983). But *Turkette*'s evidentiary observations do not override its central holding that the government must prove the existence of an entity apart from any pattern of racketeering activity; rather, the Court was commenting on the evidence from which a jury could infer the existence of an enterprise. It may be true that evidence of racketeering activities can *support* a finding that the enterprise has a structure, but that evidence must be evaluated by a jury properly instructed on all the elements of the offense. That is, the jury must still be instructed that a RICO violation requires proof of an enterprise with an ascertainable structure. In *Masters*, for example, the jury was instructed that it needed to find an "organization with a structure and goals separate from the predicate acts themselves." 924 F.2d at 1367. On appeal, the court held that the jury could infer a structure from the fact that the enterprise was "in place ready to respond effectively" to new developments in the course of its activities. *Id.*

In this case, the Second Circuit presumably relied on its prior holding that "it is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure." *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983). For the reasons described above, however, that position is inconsistent with *Turkette*. The jury instruction in this case reflects the same error.

Second, other courts focus on the fact that non-legal entities – and criminal organizations in particular – "may not observe the niceties of legitimate organizational structures" to conclude that it is infeasible to instruct juries that they must find an ascertainable structure. *Patrick*, 248 F.3d at 19; *see also Odom v. Microsoft Corp.*, 486 F.3d 541, 551-52 (9th Cir.) (en banc), *cert. denied*, 128 S. Ct. 464 (2007). But the fact that such organizations do not have the *same* structure as legal entities does not mean that they have *no* structure. Circuit courts that require evidence of a structural hierarchy to find an association-in-fact do not, of course, require proof of the formalities found in legal entities. "Criminal enterprises have less structure than legal ones." *Masters*, 924 F.2d at 1367. Instead, those courts have described the "structure" in this context as a "mechanism for controlling and directing the affairs of the group on an on-going . . . basis," and for "the making of decisions, whether [on a] hierarchical or consensual" basis. *Riccobene*, 709 F.2d at 222; *see also Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995) (requiring proof of "an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making") (internal quotation marks omitted). A properly instructed jury can find "structure" in many attributes of associations-in-fact.

Third, some courts take the requirement of "structure" to mean that the enterprise must engage in activities other than the pattern of racketeering activity. *See, e.g., Odom*, 486 F.3d at 551 ("Such a requirement would necessitate that the enterprise have a structure to serve both illegal racketeering activities as well as legitimate activities."); *Perholtz*, 842 F.2d at 363. These courts reject any requirement of "structure" because, under that view, such a requirement is inconsistent with *Turkette*. But this conflates two distinct issues – that is, whether the enterprise engages in legitimate activities (not required) and whether the enterprise exists as an entity apart from its illegitimate activities (required). As described above, both wholly criminal and partially non-criminal enterprises may have an ascertainable structure. As *Turkette* teaches, however, the existence of an enterprise as an entity must be separate and distinct from its activities.

II. AN OVERLY BROAD READING OF RICO'S "ENTERPRISE" REQUIREMENT WOULD UPSET THE BALANCE BETWEEN STATE AND FEDERAL LAW ENFORCEMENT

Principles of statutory construction rooted in significant federal concerns reinforce the conclusion that a RICO "enterprise" must have an ascertainable structure independent of the predicate crimes and confirm the importance of the distinction established in *Turkette*. In *United States v. Bass*, 404 U.S. 336 (1971), this Court held that it would not favor reading ambiguous criminal statutes to "significantly change[] the federal-state balance" of "criminal jurisdiction." *Id.* at 349. The court of appeals' interpretation of "enterprise" would tip the scales too heavily in favor of federal criminal jurisdiction by granting federal prosecutors the authority to prosecute state crimes. This Court should "not be quick to assume that Congress . . . meant to effect" such a "significant change in the sensitive relation between state and federal criminal jurisdiction." *Id.*

A. The Absence Of An Ascertainable Structure Requirement Enables Federal Prosecutors To Prosecute Crimes That Ordinarily Fall Within The Purview Of State Authorities

As this Court acknowledged in *Turkette*, RICO grants significant power to federal prosecutors to prosecute criminal acts that are also crimes under state law. *See* 452 U.S. at 586 ("Congress was well aware that it was entering a new domain of federal involvement."). Congress circumscribed that power, however, by requiring that it be exercised only when the crime involved an "enterprise" that is independent of the "pattern of racketeering activity" or the acts themselves. The inclusion of that independent requirement indicates Congress's intent not to displace state prosecutorial authority except in those circumstances where an "enterprise" engaged in a "pattern of racketeering activity." That circumstance is distinct from a mere series of crimes committed by an overlapping group of individuals. As described above, prosecution of such enterprises is the key federal interest that Congress sought to vindicate through RICO. If, however, an "enterprise" can be defined solely by the racketeering acts in which it engages, then the distinction between the "enterprise" and the "pattern of racketeering activity" collapses. That in turn threatens the balance between state and federal authority that Congress struck.

The "pattern of racketeering activity" under RICO may be comprised of any two acts of "racketeering activity" committed within 10 years of each other. *See* 18 U.S.C. § 1961(5). A wide range of crimes qualify as "racketeering activity," including "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, [or] extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year." *Id.* § 1961(1)(A). Under the definition of "enterprise" in the jury instruction approved in this case, then, a federal RICO prosecution may be brought against two individuals who come together within a single jurisdiction for the sole purpose of committing two or more state crimes. That would mark a significant expansion of federal authority to prosecute what might otherwise be exclusively state crimes, but without the special circumstance – the presence of an "enterprise" – that implicates the important federal interest in "eradicating organized crime from the social fabric." *Turkette*, 452 U.S. at 585.[2] As described in Part I.B.4, *supra*, RICO takes aim at structured organizations that can impose potentially greater harms upon society and that have proven historically more difficult to prosecute. To allow prosecutions in cases where that interest is not implicated would stray significantly from that core policy objective.

In this case, the defendants burgled a series of banks, thereby giving rise to federal bank burglary charges. *See* Br. in Opp. 2; *supra* note 2. If, however, the defendants had burgled a series of houses, the prosecution would still be sustainable under the Second Circuit's reading of the RICO statute. Petitioner and his co-defendants associated for the purpose of committing a series of crimes; robbing a house may be a racketeering act under the statute. *See* 18 U.S.C. § 1961(1)(A). In the absence of any additional requirement of structure, the government could secure a RICO conviction by proving that the defendants acted together to carry out a series of local burglaries.

The use of the statute in that manner is improper in light of Congress's federal interest in adopting the RICO statute. RICO criminalizes "the furthering of the enterprise; not the predicate acts," *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981), and "was enacted to supplement rather than replace the existing predicate crimes and penalties," *United States v. Crosby*, 20 F.3d 480, 484 (D.C. Cir. 1994). In other words, "Congress intended that a RICO violation be a discrete offense that can be prosecuted separately from its underlying predicate offenses." *Id.* But if the "enterprise" is synonymous with the underlying predicate crimes, and the underlying predicate crimes are solely state crimes, then the distinct federal interest – that is, a federal interest in prosecuting criminal *organizations* as opposed to the underlying crimes – is essentially read out of the statute. *Cf. United States v. Carillo*, 229 F.3d 177, 182 (2d Cir. 2000) (noting that "RICO's allusion to state crimes was not intended to incorporate elements of state crimes" into the RICO statute) (internal quotation marks omitted). If, on the other hand, the government must prove the existence of an enterprise with independently ascertainable structure, then the prosecution requires something more than proof of state crimes: it requires proof of an "entity." 18 U.S.C. § 1961(4). As described in Part I.B.4, *supra*, the presence of an entity is what implicates the particularly federal interests behind the statute.

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[2] The "pattern of racketeering activity" charged in this case involved bank robberies punishable under federal law and therefore does not implicate these federalism concerns directly. *See* 18 U.S.C. § 2113(a). But many of the same concerns about expanded prosecutorial discretion – including providing prosecutors with the ability to wield greatly enhanced penalties – apply in the case of federal crimes as well.

B. Prosecuting An "Enterprise" Defined Solely By State Criminal Activities Is Inconsistent With Basic Principles Of Federalism

1. As the Court has recognized, "[u]nder our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). States traditionally enjoy a "historical[] . . . sovereign[ty]" in defining and policing basic criminal offenses with which this Court is loathe to interfere. *Id.* at 564. The court of appeals' interpretation puts

at risk several attributes of state sovereignty in the area of law enforcement.

First, the Court "accord[s] . . . deference to the policy judgments that find expression in the legislature's choice of [criminal] sanctions." *Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality). Local policy preferences take on special importance with respect to prohibited acts that carry the sanctions of the criminal law. The Court should therefore be particularly wary of allowing an overbroad reading of the RICO statute to override local preferences in this area.

The Second Circuit's interpretation of "enterprise" has precisely this effect. This concern is especially sharp given that RICO's penalties are often harsher than comparable penalties under state law. Without the requirement of a structured enterprise, federal prosecutors could use RICO not only "to invoke an additional penalty" in any case involving commission of two state offenses "listed as racketeering activities," *Riccobene*, 709 F.2d at 221 (internal quotation marks omitted), but also to impose a *conflicting* penalty. In New York, for example, ordinary burglary – of, say, a convenience store – is punishable by a sentence of imprisonment up to seven years. *See* N.Y. Penal Law §§ 70.00(2)(d), 140.20. A RICO prosecution of several acts of state burglary, however, would result in a sentence of up to 20 years of imprisonment and asset forfeiture for each substantive violation. *See* 18 U.S.C. § 1963(a).[3]

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[3] It is worth noting that a more limited reading of "enterprise" has salutary benefits for the application of RICO in the civil context. *See* 18 U.S.C. § 1964. In that context, the requirement of an ascertainable structure would serve as a "common-sense liability limitation," helping to prevent civil plaintiffs

Requiring that an "enterprise" have ascertainable structure justifies the additional penalty. In that circumstance, a different sovereign has chosen to criminalize a kind of behavior that includes but is distinct from the state offense. But if the federal penalty is imposed for precisely the same behavior that the State chooses to criminalize – because a RICO enterprise does not exist beyond the solely state-law predicate acts in which it engages – then RICO would be a tool to override the local preferences of the State. This would be in contravention of the long history of allowing local mores in the context of criminal sanctions for state offenses to prevail and would fail to give "full effect to the State's choice of [its] legitimate penological goal[s]." *Ewing*, 538 U.S. at 29 (plurality).

Second, democratic accountability requires clarity in the application of the criminal law. Dispensing with a meaningful "enterprise" requirement under the statute would greatly expand concurrent state and federal jurisdiction over certain crimes. When a federal court interprets a federal statute to cover conduct that is characteristically criminalized by state law and prosecuted by state officers, lines of political accountability may be blurred. That would contravene this Court's federalism-based requirement that "citizens . . . have some means of knowing which of the two governments to hold accountable for the failure to perform a given function." *Lopez*, 514 U.S. at 576-77.

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from wielding the threat of treble damages and attorneys' fees in federal court in support of meritless claims. *Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000).

Third, an expansive interpretation of "enterprise" could misallocate limited federal resources. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) (noting danger of "overextend[ing] limited federal police resources" when federal criminal statute could be interpreted to reach state crimes); *Bass*, 404 U.S. at 350 (same). Federal resources are best used to investigate and prosecute multi-jurisdictional crimes or crimes in which the federal government has a particular interest. Federal prosecution of state crimes may result in both the unnecessary duplication of law enforcement efforts across jurisdictions and the diversion of federal resources away from the prosecution of crimes for which their specialized expertise is better suited. Those crimes, of course, include the multi-jurisdictional organized crime that RICO was intended to combat, *see supra* Part I.B.4, as well as national security matters, complex financial fraud, and other such activity that implicates distinctly federal interests.

Such prosecutions also put unnecessary strain on the federal courts. Federal judges have been among the most vocal critics of "[t]he trend to federalize crimes that traditionally have been handled in state courts," which "not only . . . tax[es] the Judiciary's resources and affect[s] its budget needs, but . . . also threatens to change entirely the nature of our federal system." Hon. William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary* *3 (Jan. 1999), *available at* http://www.uscourts.gov/ttb/jan99ttb/january1999.html. Prosecuting essentially state criminal actions in federal court unnecessarily adds to the already-clogged federal criminal docket with no corresponding justification.

2. Federalism concerns are particularly pronounced in this context because the nature of federal law enforcement effectively gives individual prosecutors the ability to determine whether ordinarily local crimes will be federalized. Expanding the scope of federal criminal jurisdiction necessarily expands the scope of prosecutorial discretion and therefore pushes decision-making about the "sensitive" "federal-state balance" in criminal enforcement farther from politically accountable actors. *Bass*, 404 U.S. at 349.

Individual federal prosecutors have wide, almost unchecked discretion to make RICO charging decisions.[4] The prosecution of federal crimes is the "special province" of the Executive Branch. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). Courts are therefore "hesitant to examine the decision whether to prosecute." *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). Because the many factors that bear upon the exercise of prosecutors' "broad discretion," *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982), are "not readily susceptible to the kind of analysis the courts are competent to undertake," the decision to prosecute is "particularly ill-suited to judicial review," *Wayte*, 470 U.S. at 607. Courts therefore do not ordinarily review the decision to charge a crime.

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[4] The *United States Attorneys' Manual* (1997) acknowledges this concern and imposes some internal limitations on prosecutors' ability to bring RICO charges. All such proposed indictments are subject to review by the Criminal Division of the Department of Justice ("DOJ"). *See* USAM 9-110.101. Of particular relevance here, the *Manual* provides that "RICO should be used to prosecute what are essentially violations of state law only if there is a compelling reason to do so." USAM 9-110.310. DOJ's own decision to channel its discretion in this fashion further suggests that the appropriate interpretation of "enterprise" should keep that element distinct from the underlying predicate crimes. At the very least, DOJ's internal limitations do not detract from the argument that interpreting RICO to allow the prosecution of state crimes vests too much discretion in individual prosecutors. The *Manual* does not create any enforceable substantive or procedural rights. *See United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir. 1993) (citing USAM 1-1.100). And DOJ may easily reverse its position; as described above, such decisions are not reviewable.

The result is that a prosecutor's decision to charge two loosely related individuals under RICO based solely on predicate acts criminalized by state law is judicially unreviewable. The decision to alter the lines between federal and state criminal enforcement should not be made by federal prosecutors on a case-by-case basis.

C. The Court Should Preserve A Meaningful "Enterprise" Requirement To Avoid Expanding The Scope Of Federal Criminal Jurisdiction Without Express Congressional Sanction

1. As described above, this Court has expressed a particular sensitivity to the balance of power between the States and the federal government in the criminal arena. The Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Bass*, 404 U.S. at 349. The Court has repeatedly "resist[ed] the Government's reading of" a criminal statute when it "invites [the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also Jones v. United States*, 529 U.S. 848, 858 (2000) (rejecting an interpretation that would "render the 'traditionally local criminal conduct' in which petitioner . . . engaged 'a matter for federal enforcement'") (quoting *Bass*, 404 U.S. at 350).

In similar cases, where the government sought an expansive construction of a criminal statute that would affect the federal-state balance, this Court has opted for the narrower construction when Congress's intent was not made explicit. For example, in *Rewis*, the Court refused to adopt an "expansive" interpretation of the Travel Act, because, in part, it "would alter sensitive federal-state relationships [and] could overextend limited federal police resources." 401 U.S. at 812. And, in *Bass*, the Court rejected an aggressive reading of a federal firearm law, stating that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." 404 U.S. at 349.

For similar reasons, the Court should reject a construction of "enterprise" that does not require an ascertainable structure; otherwise, the element of "enterprise" would collapse into predicate acts themselves, rendering purely state criminal conduct a matter of federal enforcement. "[I]t would require statutory language much more explicit than that . . . here" to reach the conclusion "that Congress intended to put the Federal Government in the business of policing" wholly state crimes through the application of a broad concept of "enterprise." *United States v. Enmons*, 410 U.S. 396, 411 (1973). Nothing in the definition of "enterprise" or the substantive offense suggests that is so. Given the potential mischief from a definition of "enterprise" that encompasses a series of activities criminalized by state law – in the absence of some ascertainable structure – it is appropriate to require a "clear statement" from Congress of its intent to bring about that result. *Bass*, 404 U.S. at 349. Because such a clear statement is lacking here, the Court should construe the meaning of "enterprise" narrowly. *See id.* at 349-50.

2. Nothing in the Court's prior cases addressing the federalism concerns that arise out of RICO requires a different outcome.

In *Turkette*, for example, the Court declined to use concerns over federalism as a basis for limiting the meaning of "enterprise" to legitimate organizations. *See* 452 U.S. at 586-87. The Court reasoned that, "even assuming" that a definition of "enterprise" that included legitimate *and* illegitimate organizations would "substantially alter the balance between federal and state enforcement of criminal law," "the language of the statute and its legislative history indicate[d] that Congress was well aware . . . that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law." *Id.*

Turkette is distinguishable on two grounds. *First*, there is a significant difference between interpreting RICO to cover several types of enterprises, as the Court did in *Turkette*, and interpreting it to eliminate – for all practical purposes – the requirement of an independently ascertainable enterprise, as the court of appeals did in this case. The former interpretation brought within the statute's ambit a larger number of potential state prosecutions – namely, those that might be associated with wholly illegitimate enterprises. But that interpretation nevertheless retained the federal interest in prosecuting those crimes *when they involved discrete organizations*. That interpretation depended on the existence of a uniquely federal element of the crime – the "enterprise" – that had to be proven in federal court.

Congress could have reasonably chosen to supplement state criminal enforcement in the service of achieving that federal goal. *See Turkette*, 452 U.S. at 586-87.

In this case, by contrast, the court of appeals' interpretation of "enterprise" renders it synonymous with the underlying state offenses in which the enterprise engages. As described above, that effectively removes the federal interest in prosecuting discrete organizations and instead allows prosecutions of two or more individuals whose association is defined solely by the state crimes they commit. That is a far more significant change than the issue addressed in *Turkette*.

Second, the *Turkette* Court concluded that the plain language of the statute could not be read to draw a distinction between legitimate and illegitimate organizations. *See id.* at 580-81. In the absence of any ambiguity, this Court concluded that "Congress was well aware of the fear that RICO would move large substantive areas formerly totally within the police power of the State into the Federal realm." *Id.* at 586-87 (alteration and internal quotation marks omitted). For the reasons described in Part I, the language of the statute and the concerns that animated its enactment make clear that Congress intended *not* to federalize the prosecution of state offenses in the absence of a structured organization, which is the linchpin of the federal interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Petitioner,

v.

UNITED STATES,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

◆

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MCKESSON CORPORATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether an association-in-fact "enterprise" under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, must possess an ascertainable structure rather than merely be capable of engaging in the alleged pattern of racketeering activity.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MCKESSON CORPORATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY 1

INTERESTS OF *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 7

ARGUMENT 11

THE PLAIN LANGUAGE OF SECTIONS 1961(4) AND 1962(C) REQUIRE THE GOVERNMENT OR A CIVIL RICO PLAINTIFF TO PLEAD AND PROVE THAT A RICO ASSOCIATION-IN-FACT ENTERPRISE HAS AN ASCERTAINABLE STRUCTURE AND NOT JUST ESTABLISH THAT A GROUP OF INDIVIDUALS IS CAPABLE OF CONDUCTING THE ALLEGED PATTERN OF RACKETEERING ACTIVITY 11

- A. The Rulings Of The Court Below And Of A Few Other Circuits Erroneously Conflate The Separate Statutory Requirements Of A RICO "Enterprise" And A "Pattern Of Racketeering Activity" 12

TABLE OF CONTENTS – Continued

Page

B. Requiring An Ascertainable Structure For A RICO Association-In-Fact Enterprise Is Consistent With The Statute's Purpose.................................. 21

C. Legitimate Businesses Throughout The Nation Are Subject To Frivolous Civil RICO Actions That Would Require Them To Engage In Costly Trials Or Settlements Without Application Of The "Enterprise" Requirement That Congress Enacted.... 26

D. If This Court Rejects The Ascertainable Structure Interpretation Of "Enterprise," The Court Should Make Clear That An Association-In-Fact Enterprise Must Be Comprised Of *Individuals*, Not Corporations Or Other Organizations............................ 32

CONCLUSION.. 35

TABLE OF AUTHORITIES

Page

CASES:

Asa-Brandt, Inc. v. ADM Investor Servs., Inc., 344 F.3d 738 (8th Cir. 2003) 30

Bachman v. Bear Stearns & Co., 178 F.3d 930 (7th Cir. 1999) 27, 28

Begala v. PNC Bank, 214 F.3d 776 (6th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 31

Begay v. United States, 128 S. Ct. 1581 (2008) 15

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 17

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 14

Clinton v. New York, 524 U.S. 417 (1998) 33

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 29

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) 16

Fitzgerald v. Chrysler Corp., 116 F.3d 225 (7th Cir. 1997) 29

H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989) 4, 15

Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961) 14

Limestone Dev. Corp. v. Village of Lemont, Ill., 520 F.3d 797 (7th Cir. 2008) 28

Page

McDonough v. National Home Ins. Co., 108 F.3d 174 (8th Cir. 1997) 28

Montello Salt Co. v. Utah, 221 U.S. 452 (1911) 33

Montesano v. Seafirst Commercial Corp., 818 F.2d 423 (5th Cir. 1987) 28

Norfolk Southern Ry. Co. v. Sorrell, 549 U.S. 158 (2007) 19

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007) 27, 28

Reves v. Ernst & Young, 507 U.S. 170 (1993) ....*passim*

Richmond v. Nationwide Cassel L.P., 52 F.3d 640 (7th Cir. 1995) 26, 28

Russello v. United States, 464 U.S. 16 (1983) 21

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) ....*passim*

Stachon v. United Consumers Club, Inc., 229 F.3d 673 (7th Cir. 2000) 31

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 17, 33, 34

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) 7, 8, 12, 17

United States v. Bledsoe, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982) 17, 24

United States v. Blinder, 10 F.3d 1468 (9th Cir. 1993) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Bonanno Organized Crime Family of La Cosa Nostra, 879 F.2d 20 (2d Cir. 1989) 5

United States v. Chance, 306 F.3d 356 (6th Cir. 2002) 23, 25

United States v. Darden, 70 F.3d 1507 (8th Cir. 1995), *cert. denied*, 464 U.S. 849 (1983) 24

United States v. Gray, 137 F.3d 765 (4th Cir.), *cert. denied*, 525 U.S. 866 (1998) 25

United States v. Huber, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) 33

United States v. Kehoe, 310 F.3d 579 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003) 23, 26

United States v. Keltner, 147 F.3d 662 (8th Cir. 1998) 24

United States v. Kragness, 830 F.2d 842 (8th Cir. 1987) 24

United States v. Mazzei, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983) 7

United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) 18

United States v. Riccobene, 709 F.2d 214 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983) 24

United States v. Sanders, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991) 25

United States v. Santos, 128 S. Ct. 2020 (2008) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 413 F.3d 1253 (10th Cir. 2005), *cert. denied*, 546 U.S. 1120 (2006) 23, 25

United States v. Turkette, 452 U.S. 576 (1981) ....*passim*

Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 14

Whelan v. Winchester Prod. Co., 319 F.3d 229 (5th Cir. 2003) 18, 30

STATUTES:

18 U.S.C. § 18 34

18 U.S.C. § 371 6

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968:

§ 1961 11

§ 1961(1) 5

§ 1961(3) 33, 34

§ 1961(4) ....*passim*

§ 1961(5) 4

§ 1962 ....*passim*

§ 1962(c) ....*passim*

§ 1962(d) 4, 5, 8, 22

§ 1963 5

§ 1964(a) 5

TABLE OF AUTHORITIES – Continued

Page

§ 1964(b) 5

§ 1964(c) 5

18 U.S.C. § 2113(a) 6

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) 21

Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (1970) 3, 19

MISCELLANEOUS:

Federal Judicial Caseload Statistics (2001-2007) 30

S. Rep. No. 91-617 (1969) 22

Webster's Third New International Dictionary (1986) 34

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND MCKESSON CORPORATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY[1]

The Chamber of Commerce of the United States of America and McKesson Corporation respectfully submit this brief as *amici curiae* in support of neither party.

INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

McKesson Corporation is the nation's leading healthcare and information technology company, and is the largest pharmaceutical distributor in North America. McKesson is responsible for the distribution of one-third of the medicines used in North America, and supplies more than 25,000 healthcare locations across the country, ranging from Wal-Mart to the Department of Veterans Affairs to community pharmacies. McKesson employs 30,000 people, and is among the Global Fortune 500.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, serves an important purpose to deter and punish organized criminal conduct. RICO has been extended, however, beyond the scope of its statutory text in some circumstances and misused against businesses and other organizations because of the civil remedy provision which grants to plaintiffs treble damages and the recovery of attorneys' fees. In a number of cases, courts have unnecessarily expanded liability under RICO through an overbroad interpretation of what constitutes a RICO "enterprise." For example, under the rationale employed by the court below and a minority of other courts of appeals, the government and civil plaintiffs under 18 U.S.C. § 1962(c) can adequately establish a RICO association-in-fact "enterprise" by demonstrating nothing more than a group of individuals capable of accomplishing the alleged racketeering activity.

Such rulings override an important statutory check on the award of treble damages that Congress established in the more restricted definition it provided for "enterprise" in the statute. Those rulings threaten RICO litigation against every business collaboration in which legitimate businesses might engage, because they determine whether the enterprise requirement is met based on what the so-called "enterprise" does rather than what it is. Such collaborations among business entities and persons, ranging from a single contract to more elaborate alliances, are essential for many American businesses to compete effectively, expand into new markets, make costly investments, and engage in innovation. The unconstrained definition of enterprise adopted below allows plaintiffs to transform run-of-the-mill civil actions into RICO actions for treble damages against businesses who engage in lawful collaborations.

Amici have a strong interest in the Court correctly interpreting RICO and vacating the decision below so that the jury can be properly instructed as to RICO's enterprise requirement.

STATEMENT

1. Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, tit. IX, 84 Stat. 941, in 1970 to combat the growing influence of organized crime over the national economy. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S.

479, 494-500 (1985); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 245 (1989).

In 18 U.S.C. § 1962, RICO establishes a series of prohibited activities. Relevant to the instant dispute, Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise" "to conduct or participate * * * in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Based upon this plain language, the Court has held that a violation of Section 1962(c) requires proof of four independent elements—*viz.*, that a defendant (1) conduct the affairs of (2) an enterprise with which he is associated or employed (3) through a pattern (4) of racketeering activity. *Sedima*, 473 U.S. at 496. And Section 1962(d) also imposes liability on anyone who conspires to violate Section 1962(c).

Each of these elements of Section 1962(c) is defined by the statute or has been previously construed by this Court. (1) To "conduct" the affairs of an enterprise, the defendant must participate in the operation or management of the enterprise. *Reves v. Ernst & Young*, 507 U.S. 170 (1993). (2) RICO defines "enterprise" to "include[ ] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). (3) A "pattern" of racketeering activity requires at least two racketeering acts within 10 years, *id.* § 1961(5), and (4) "racketeering activity" is defined to include any one of a host of enumerated acts, including acts that are indictable under federal criminal statutes (such as mail and wire fraud) as well as numerous types of conduct that are chargeable under state law, *id.* § 1961(1).

Criminal violations of Section 1962 are punishable by up to 20 years' imprisonment (or life, in some circumstances), a fine, and criminal forfeiture. *Id.* § 1963.

A plaintiff in a civil action may recover damages if that person was "injured in his business or property by reason of a violation of [S]ection 1962" and Section 1964 specifies that the person "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." *Id.* § 1964(c). Section 1964(a) and (b) also imposes significant civil penalties for violations of RICO.[2]

2. Petitioner was convicted of racketeering in violation of 18 U.S.C. § 1962(c) and conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(d), as well as other crimes related to a string

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[2] With regard to civil RICO actions, the government can seek only civil penalties and injunctive relief under Section 1964(a) and (b). The government is not authorized to bring treble damages actions under 18 U.S.C. § 1964(c), *see United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21-27 (2d Cir. 1989) (holding that the United States is not a "person" who can sue under Section 1964(c)). Also the causation requirement imposed by Section 1964(c) that the person be injured in his "business or property by reason of a violation of section 1962" does not apply in criminal cases.

of bank robberies that petitioner and other members of his crew committed in at least five States between 1991 and 1999.[3]

In the jury instructions, the district court explained that "an enterprise need not be a formal business entity such as a corporation, but may be merely an informal association of individuals. * * * Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." JA 111a-112a.

The district court emphasized that the jury "may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts." JA 112a. And the court stated that "it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." *Ibid.* The instructions were given over petitioner's objection.

3. The court of appeals affirmed petitioner's conviction but vacated his sentence. Pet. App. 4a.

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[3] Petitioner was also convicted of conspiracy to commit bank burglary, in violation of 18 U.S.C. § 371; and eight counts of bank burglary or attempted bank burglary, in violation of 18 U.S.C. § 2113(a).

Petitioner argued to the court of appeals that the district court's instructions were erroneous because they failed to require the government to establish that the alleged enterprise had "an ascertainable structure distinct from that inherent in the alleged pattern of racketeering." Boyle C.A. Br. 20 (internal quotation marks and citation omitted).

The court of appeals rejected the argument, among others, as "without merit." Pet. App. 3a. The well-settled precedent in the Second Circuit holds that the "enterprise" element of RICO must be given "broad scope," *United States v. Mazzei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), and, consistent with the district court's instruction to the jury in this case, the Second Circuit has "upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts," *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983) (citing *Mazzei*, 700 F.2d at 88-89), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

SUMMARY OF ARGUMENT

A. The Racketeer Influenced and Corrupt Organizations Act (RICO) imposes criminal liability and authorizes a civil treble damages award against a person who is employed by or associated with an "enterprise" and who conducts the affairs of that "enterprise" through a pattern of racketeering, 18

U.S.C. § 1962(c), or conspires to do the same, *id.* § 1962(d). RICO defines "enterprise" for this purpose as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). This case presents the question whether the government, or a plaintiff in a civil suit, must establish that an association-in-fact enterprise possesses an ascertainable structure or whether it is sufficient for the government or the plaintiff to prove that the "union or group of individuals" allegedly associated in fact was capable of conducting the pattern of racketeering activity alleged.

The court below mistakenly defines a RICO enterprise to require nothing "more than the sum of the predicate racketeering acts." *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). The court reasons that an ascertainable structure need not be established because "it is logical to characterize any associative group in terms of what it *does*, rather than by any abstract analysis of its structure." *Id.* at 56 (emphasis in original).

That interpretation of what constitutes a RICO enterprise is wrong on two grounds. First, it ignores the plain language of 18 U.S.C. § 1961(4) that expressly defines an "enterprise" by what it is, rather than what it does. And, second, the refusal to require that there be some ascertainable structure before a group of individuals engaged in racketeering can be deemed a RICO enterprise eviscerates any distinction between the separate "enterprise" and "pattern of racketeering" elements of a RICO Section 1962(c) offense.

B. The existence of a RICO enterprise is the critical factor that distinguishes a RICO violation from that of an ordinary conspiracy. Congress enacted RICO to attack the infiltration into legitimate organizations by organized crime and racketeering and to eradicate racketeering activity conducted by organized crime. Requiring that an ascertainable structure exist is consistent with these goals because, by their very nature, organizations such as the mafia and drug cartels must operate through such a structure in order to be able to function effectively and to evade law enforcement and it is that particular criminal success that Congress targeted as more dangerous to society and deserving of harsher criminal and civil penalties.

The application by other Circuits of an interpretation that requires an ascertainable structure to satisfy the RICO enterprise requirement demonstrates that such an interpretation does not preclude successful prosecutions under RICO. Courts of appeals applying the ascertainable structure requirement have repeatedly and routinely upheld convictions, notwithstanding arguments challenging the evidentiary findings on the existence of an ascertainable structure. Indeed, we do not take a position on whether application of this more stringent standard under Sections 1961(4) and 1962(c) would exonerate petitioner because there may be sufficient evidence of an enterprise under the ascertainable structure standard, but we demonstrate that the jury instruction given at his trial was contrary to the enterprise requirement of RICO.

C. Adoption by this Court of the Second Circuit's overbroad definition of the RICO enterprise requirement under Section 1961(4) and 1962(c) would have particularly grave consequences for this Nation's businesses.

There can be no dispute that not every conspiracy constitutes an "enterprise" for RICO purposes. If it were otherwise and a simple group of individuals without any ascertainable structure satisfied the RICO enterprise requirement, every conspiracy to commit fraud would constitute a RICO enterprise and every fraud that requires more than one person to commit would constitute a RICO violation. Such a transformation of simple conspiracies and business torts into racketeering activity subject to treble damages would impose significant civil RICO liability costs because allegations of wrongdoing involving common, legitimate business arrangements, would now be made in the form of RICO allegations with the threat of treble damages.

D. If this Court nonetheless concludes that an association-in-fact enterprise requires no ascertainable structure, the Court's holding should be limited to a "union or group of *individuals*"—*i.e.*, human beings—not corporations or other non-individual legal entities. Had Congress intended "individual" to include a "corporation" it would not have included both terms in the definition for enterprise in Section 1961(4).

ARGUMENT

THE PLAIN LANGUAGE OF SECTIONS 1961(4) AND 1962(C) REQUIRE THE GOVERNMENT OR A CIVIL RICO PLAINTIFF TO PLEAD AND PROVE THAT A RICO ASSOCIATION-IN-FACT ENTERPRISE HAS AN ASCERTAINABLE STRUCTURE AND NOT JUST ESTABLISH THAT A GROUP OF INDIVIDUALS IS CAPABLE OF CONDUCTING THE ALLEGED PATTERN OF RACKETEERING ACTIVITY

The plain language of Section 1962(c) imposes liability on a defendant in a RICO action only if the defendant (1) conducts the affairs (2) of an enterprise with which the defendant is associated or employed (3) through a pattern of (4) racketeering activity. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). At issue in the instant case is what the government, or a plaintiff in a civil case, must plead and prove to satisfy the RICO "enterprise" element. The court below has long permitted the RICO enterprise requirement to be satisfied so long as there is proof of a "pattern of racketeering activity." But that construction of the RICO statute erroneously merges two distinct elements of Section 1962(c) and two separate definitions under Section 1961.

A. The Rulings Of The Court Below And Of A Few Other Circuits Erroneously Conflate The Separate Statutory Requirements Of A RICO "Enterprise" And A "Pattern Of Racketeering Activity"

1. The court below and a minority of federal courts of appeals to have considered the issue are wrong that the RICO requirement of an association-in-fact enterprise can be satisfied by any group of two or more individuals who are capable of performing the racketeering activity through which the defendant is alleged to have conducted the enterprise's affairs. According to the Second Circuit, a RICO association-in-fact "enterprise" need not be any "more than the sum of the predicate racketeering acts" because "it is logical to characterize any associative group in terms of what it *does*, rather than by any abstract analysis of its structure." *United States v. Bagaric*, 706 F.2d 42, 55-56 (2d Cir. 1983) (emphasis in original), *abrogated on other grounds by*, *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994).

That rationale ignores the statutory text of RICO which must be the starting place for construing the statute. *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). The plain language of the definition of "enterprise" in Section 1961(4) and of the prohibited activity in Section 1962(c) unquestionably requires more than proof of a pattern of racketeering activity to satisfy the RICO enterprise requirement and to impose RICO criminal and treble civil damages liability under Section 1962(c).

a. The rationale of the Second Circuit is contrary to RICO's explicit statutory definition of "enterprise" in Section 1961(4). For RICO purposes, an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Nothing in this text defines an enterprise by the "terms of what it does." Rather, the text of Section 1961(4) defines an enterprise by what it is. Indeed, Section 1961(4) divides the term "enterprise" into two distinct categories that focus only on the structure and composition of the organization. In the first category, the enterprises are legal entities. The second category covers enterprises that are not legal entities but that are composed of unions or groups of individuals associated in fact.

Based on this text, this Court has held that "[e]ach category [of an enterprise] describes a separate type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not. The latter is not a more general description of the former." *United States v. Turkette*, 452 U.S. 576, 582 (1981). Had Congress intended *any* group of individuals to satisfy the enterprise requirement based solely upon what that group does, as the court below suggests, it would not have been necessary for Congress to create the two distinct categories of legal entities and not legal entities. Congress instead would have defined "enterprise" to mean any group or organization. *United States v. Santos*, 128 S. Ct. 2020, 2029 n.6 (2008) ("We do not normally interpret a text in a manner that makes one of its provisions superfluous.").

The statutory structure of the Section 1961(4) definition also demonstrates that an association-in-fact enterprise requires proof of an ascertainable structure. This Court has repeatedly recognized that "a word is known by the company it keeps." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). Statutory terms capable of many meanings must be interpreted by reference to their relationship with other associated words and phrases. *Ibid.* General terms such as "union" and "group" must be "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001)).

An overbroad interpretation of "any union or group of individuals associated in fact" as used in Section 1961(4) would violate this tenet, because it ignores the inherent structure that exists in the entities to which Congress intended to refer as association-in-fact enterprises. The presence of specific enumerated legal entities in the first category of the statutory definition of enterprise "indicates that the statute covers only" unions or groups in the second category of enterprise that have a "*similar*" sort of structure to the legal entities in the first category, "rather than *every*" union or group of more than one individual. *Begay v. United States*, 128 S. Ct. 1581, 1585 (2008) (emphases in original).[4]

b. The longstanding interpretation of RICO's enterprise requirement by the court of appeals below ignores the manner in which the term "enterprise" is used in Section 1962 which makes unlawful under RICO certain "prohibited activities."

Liability under Section 1962(c) is predicated upon proof of four distinct elements: a defendant's (1) conduct or participation in the affairs (2) of an enterprise with which the defendant is associated or employed (3) through a pattern of (4) racketeering activity. This Court has held that Section 1962(c) requires the government, or a private plaintiff in a civil case, to "allege each of these elements to state a claim." *Sedima*, 473 U.S. at 496.

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[4] To the extent the government relies on the fact that Section 1961(4) uses the term "*any* union or group," this Court should find the Court's construction of Section 1961 in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), instructive. In *H.J.*, this Court explained that the Section 1961 definition of "pattern of racketeering" "does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern." *Id.* at 237. Although some definitions in Section 1961 specify what a particular term "means," the "enterprise" definition begins with the phrase "enterprise *includes*," and sets forth the minimum conditions required, but not necessarily sufficient, to meet that definition.

The "enterprise" and "pattern of racketeering activity" requirements are distinct elements. *Turkette*, 452 U.S. at 583. "The enterprise is an *entity*, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct" and "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Ibid.* (emphasis added). By contrast, "[t]he pattern of racketeering activity is * * * a series of criminal acts defined by statute" which are proven "by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Ibid.*

An examination of Section 1962(c) as a whole demonstrates that the distinct enterprise requirement must not be guided by what it accomplishes but by its form as an ascertainable entity. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). It is the pattern of racketeering requirement, not the enterprise requirement, which focuses on the alleged unlawful conduct.

To define an association-in-fact enterprise based upon "what it *does*, rather than by * * * its structure," *Bagaric*, 706 F.2d at 56 (emphasis in original), ignores the statutory structure set forth in *Turkette* that an enterprise is an "*entity*" with an ongoing organization functioning as a continuing unit. The absence of any requirement of an ascertainable structure for a RICO enterprise would eviscerate any distinction between the "enterprise" and "pattern of racketeering" elements of RICO under Section 1962(c). *Cf. Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) ("We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is simply not the same 'person' referred to by a different name."). And if the enterprise requirement were satisfied merely by allegations of a defendant or defendants engaging in a pattern of racketeering activity, then the enterprise requirement would be superfluous to the statutory scheme, contrary to the ordinary assumption that Congress intended statutory terms to have meaning. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

It is of no moment that this Court has noted that "the proof used to establish these separate elements may in particular cases coalesce." *Turkette*, 452 U.S. at 583. Certain highly complex patterns of racketeering activity prosecuted under RICO, *see, e.g., United States v. Bledsoe*, 674 F.2d 647, 652-654 (8th Cir.) (detailing racketeering activities based on extensive fraudulent interstate sales of securities), *cert. denied*, 459 U.S. 1040 (1982), might necessarily require an association-in-fact enterprise to possess a significant ascertainable organizational structure in order to accomplish the enterprise's unlawful goals. In those limited circumstances, it may be that an enterprise's ascertainable structure is demonstrated by the proof of the complex pattern of racketeering activity charged in the indictment or alleged in the civil complaint. But in the ordinary case, proof of two or more acts of racketeering—such as two or three acts of federal wire fraud—do not in and of themselves demonstrate that the alleged "group of individuals" formed a RICO enterprise. *Whelan v. Winchester Prod. Co.*, 319 F.3d 229, 230 (5th Cir. 2003) (explaining that mailing a few false production reports for one's company is not enough in and of itself to constitute a RICO enterprise between individuals). Indeed, the Court has made clear that "proof of one [RICO element] does not necessarily establish the other." *Turkette*, 452 U.S. at 583.

2. The oft-mischaracterized language from *Turkette*, that "[t]here is no restriction upon the associations embraced by" Section 1961(4), *id.* at 580, does not mean that any group of two or more individuals automatically satisfies the enterprise requirement. *See United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.) (quoting *Turkette*, 452 U.S. at 580), *cert. denied*, 488 U.S. 821 (1988); *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993). That language refers to the fact that there is no limitation on the *types* of associations—*i.e.*, legitimate or illegitimate—that satisfy RICO's requirements.

Turkette, 452 U.S. at 580-581. It does not say that any group of individuals, merely because it can accomplish some racketeering activity, automatically constitutes a RICO enterprise.

Likewise, the fact that RICO contains an "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,'" *Sedima*, 473 U.S. at 498 (quoting RICO, § 904(a), 84 Stat. at 947), does not support the ruling below. Because the statutory text plainly requires that the "enterprise" definition set forth in Section 1961(4) and "enterprise" element set forth in Section 1962(c) be satisfied by more than proof of a "pattern of racketeering," the "liberal construction clause" of RICO does not inform this Court's interpretation of the statute in this case. That clause is intended only "to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute," and "it is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183; *cf. Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (noting that a statute's prior liberal construction and "remedial purpose cannot compensate for the lack of a statutory basis").

3. There is no doubt that the jury in this case was improperly instructed on the RICO enterprise requirement.

The district court explained to the jury that "[c]ommon sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." JA 111a-112a. And the court emphasized that any group formed solely to carry out the charged racketeering activity is sufficient to prove a RICO enterprise. JA 112a ("[Y]ou may find an enterprise where an association of individuals, with structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts."). Although the district court's instruction requires some "organization," the court eviscerated that requirement by stating that the group need only have "sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." JA 112a-113a.

In short, the district court instructed the jury that the group of individuals need only be capable of accomplishing the alleged pattern of racketeering activity to be deemed a RICO enterprise satisfying an element of the Section 1962(c) offense. The district court's instruction thus contradicts the plain language of Sections 1961(4) and 1962(c), and conflates the separate enterprise and pattern of racketeering requirements. *Turkette*, 452 U.S. at 583 ("The existence of an enterprise at all times remains a separate element which must be proved by the Government.").

Under the district court's jury instruction (which is based on the Second Circuit's standard charge, *see* JA 106a), once a pattern of racketeering activity is established, then so too is the enterprise that was necessary to accomplish that racketeering activity. That is, the government's proof that petitioner had committed racketeering activity *necessarily* demonstrated, in and of itself, that his group had the sufficient "organization" to carry out that racketeering activity and thus constituted a RICO enterprise. As discussed above, the RICO enterprise element cannot be so easily satisfied.

B. Requiring An Ascertainable Structure For A RICO Association-In-Fact Enterprise Is Consistent With The Statute's Purpose

1. In enacting RICO, a chief concern of Congress was the ability of organized crime to infiltrate legitimate business, *see Turkette*, 452 U.S. at 590; *Reves*, 507 U.S. at 185, but Congress also set its sights on sophisticated criminal operations such as "syndicated gambling, loan sharking, * * * [and] the importation and distribution of narcotics and other dangerous drugs." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-923; *see also Russello v. United States*, 464 U.S. 16, 26 (1983). By its very nature, a sophisticated criminal operation such as the mafia, a gang, or a drug cartel cannot function effectively and evade law enforcement without an ascertainable structure through which it subversively operates. Indeed, maintaining a structure through which it can conduct illegitimate activities assists a crime syndicate to bolster its economic resources and thus position itself to "springboard into the sphere of legitimate enterprise."

Turkette, 452 U.S. at 591. In either case—whether operating a legal or nonlegal entity—the ascertainable structure requirement comports with Congress's desire that RICO target criminal activity that is sophisticated enough to infiltrate legitimate businesses.

While unnecessary to resolve the instant case, the legislative history is replete with references to the highly structured nature of organized crime that Congress sought to combat. The Senate Report's "Statement In Justification," for example, explicitly noticed the "hierarchical structure" of organized crime syndicates, with "[e]ach family * * * headed by a 'boss,' whose primary functions are the maintenance of order and the maximization of profit." S. Rep. No. 91-617, at 36 (1969). Such organizations contain an "underboss" and a "consigliere" and below them are the "capodecina." *Ibid.* Further "[b]elow the 'capodecina' are the 'soldati' or the 'button' men" who "actually operate the particular illicit enterprise." *Id.* at 40. This sort of rank and hierarchy are plainly indicative of the type of association-in-fact enterprises that RICO sought to punish and deter.

The "enterprise" requirement is the critical factor that makes a RICO offense different from a common conspiracy. It would make no sense for RICO to be transformed into a common conspiracy because RICO independently makes it unlawful for any person to conspire to violate any provision of Section 1962. 18 U.S.C. § 1962(d).

2. Government prosecutions under RICO will not be hindered by an ascertainable structure requirement.

In the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Tenth Circuits, which already require proof of an ascertainable structure, the enterprise requirement has not adversely affected criminal RICO prosecutions. Association-in-fact enterprises are readily proven because they often are organized criminal associations that possess significant structure (including, for example, significant hierarchy and even organizational names). The prototypical "organized crime," such as the mafia and drug gangs, that RICO has traditionally aimed at punishing and deterring easily satisfies the RICO ascertainable structure enterprise requirement and thus can be successfully prosecuted. *See United States v. Chance*, 306 F.3d 356, 365-367, 371-373 (6th Cir. 2002) (criminal activities of the Mafia, "La Cosa Nostra"); *United States v. Smith*, 413 F.3d 1253, 1263-1264, 1266-1268 (10th Cir. 2005) (criminal activities of street gang, the "King Mafia Disciples"), *cert. denied*, 546 U.S. 1120 (2006). In *United States v. Kehoe*, 310 F.3d 579, 587 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003), for example, the Eighth Circuit concluded that a white supremacist organization named the Aryan Peoples' Republic and the Aryan Peoples' Resistance demonstrated a significant ascertainable structure where the evidence showed that (i) there was a hierarchy in the group; (ii) one person founded and led the group; and (iii) the leader possessed and controlled the majority of the proceeds from the illegal activities and distributed the remainder to his cohorts. These Circuits have repeatedly and routinely upheld convictions, notwithstanding arguments challenging the evidentiary findings on the existence of an ascertainable structure. *See, e.g.*, *Bledsoe*, 674 F.2d at 665.

The mafia, drug organizations, and other illegal entities possess an ascertainable structure due to their "function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis." *United States v. Kragness*, 830 F.2d 842, 857 (8th Cir. 1987) (quoting *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983)). The oversight and coordination activities, and sharing information to avoid apprehension or to protect the unlawful activities or to defeat rivals, all demonstrate that an ascertainable structure exists, and is almost certainly present in the criminal organizations that RICO was designed to combat. *See, e.g.*, *United States v. Darden*, 70 F.3d 1507, 1520-1521 (8th Cir. 1995) (affirming RICO conviction; finding proof of a distinct, ascertainable structure to be "overwhelming" for a highly sophisticated drug organization), *cert. denied*, 517 U.S. 1149 (1996); *United States v. Keltner*, 147 F.3d 662, 668-669 (8th Cir. 1998) (affirming RICO conviction; finding a "distinct structure" where evidence showed that (i) one individual was "clearly in charge" and directed others' activities; (ii) items stolen in earlier robberies were used in subsequent robberies; and (iii) alleged members of the enterprise engaged in intimidation and solicitation of perjury to protect their identity); *Smith*, 413 F.3d at 1267-1268 (affirming RICO conviction; finding sufficient evidence that the associated-in-fact enterprise existed apart from the pattern of racketeering activity); *Chance*, 306 F.3d at 372-373 (affirming conviction; finding that the evidence showed "a very clearly defined structure which was separate from the pattern of racketeering activity"); *United States v. Gray*, 137 F.3d 765, 772 (4th Cir.) (affirming conviction; finding substantial evidence of an identifiable structure based on the existence of a leader, an assistant, drug stash house workers, and a system of stash houses), *cert. denied*, 525 U.S. 866 (1998); *United States v. Sanders*, 928 F.2d 940, 943-944 (10th Cir.) (affirming conviction; finding evidence sufficient to establish the existence of an enterprise separate and apart from the racketeering acts), *cert. denied*, 502 U.S. 845 (1991).

3. *Amici* do not take a position on whether petitioner's crew possessed an ascertainable structure that would constitute a RICO enterprise and support the imposition of RICO liability. Evidence introduced at petitioner's trial showed that members of petitioner's crew had particular roles, protected their identities by using false names, engaged in advance surveillance and planning (including gathering the necessary tools), and divided the robbery proceeds in a systematic fashion in which members engaging in

higher risk roles were compensated with greater shares. Br. in Opp. at 6-12. These facts evince oversight and coordination activities, including coordination among members to avoid apprehension. Therefore, the government's proof at trial might have been sufficient to show the existence of an association-in-fact enterprise in circuits that already require proof of an ascertainable structure of an enterprise for RICO liability, *e.g.*, *Kehoe*, 310 F.3d at 587.

C. Legitimate Businesses Throughout The Nation Are Subject To Frivolous Civil RICO Actions That Would Require Them To Engage In Costly Trials Or Settlements Without Application Of The "Enterprise" Requirement That Congress Enacted

1. Adoption by this Court of the overbroad interpretation of the enterprise requirement in Sections 1961(4) and 1962(c) by the court of appeals below would have particularly grave consequences to this Nation's businesses because plaintiffs—enticed by RICO's treble damages and attorneys' fees—have brought an untold number of suits against legitimate businesses that attempt to evade the "essential [enterprise] element of the RICO offense" by creating "nebulous, open-ended description[s]" of the alleged RICO enterprise. *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995).

Where courts have not required proof of an ascertainable structure, simple business torts and alleged conspiracies have been transformed into racketeering activity subject to treble damages for run-of-the-mill business arrangements. In *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007), for example, the plaintiff alleged that the RICO "enterprise" consisted of nothing more than a contractual relationship between Microsoft and Best Buy under which Best Buy would advertise and promote Microsoft's MSN Internet access service in its stores and Microsoft would advertise and promote Best Buy on its MSN Internet access service and Microsoft websites. *Id.* at 555. As the concurring opinion correctly observed, the plaintiffs' complaint in *Odom* "merely states that the existence of a marketing contract and the performance of that contract constitute an enterprise," and concluded that more should be required for a RICO claim because "RICO targets a more sophisticated crowd: those persons or entities associated in fact with 'ongoing organization.'" *Id.* at 555 (Silverman, J., concurring).

The Seventh Circuit aptly explained in *Bachman v. Bear Stearns & Co.*, 178 F.3d 930 (7th Cir. 1999) (Posner, C.J.), that not every conspiracy is an "enterprise" for RICO purposes. "If [the members of the alleged associated-in-fact enterprise, a disparate group of people and entities in the particular case before the court] are a RICO organization, then every conspiracy to commit fraud is a RICO organization and consequently every fraud that requires more than one person to commit is a RICO violation. That is not the law." *Id.* at 932. The Seventh Circuit recently reaffirmed the concept that "a conspiracy is not a RICO enterprise unless it has some enterprise-like structure," *Limestone Dev. Corp. v. Village of Lemont, Ill.*, 520 F.3d 797, 804 (7th Cir. 2008) (Posner, J.), and that "enterprise" requires proof of "an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." *Id.* at 805 (quoting *Richmond v. Nationwide Cassel*, 52 F.3d at 644); *see also McDonough v. National Home Ins. Co.*, 108 F.3d 174, 177 (8th Cir. 1997) (rejecting "conclusory allegation[s] * * * that the alleged enterprise consist[s] of more than what [is] necessary" to commit the predicate acts); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987) (same).

2. The mistake made by the Ninth Circuit in *Odom* (and by the court below) is especially harmful given the crucial role that legitimate collaborative efforts between businesses have in our Nation's economy. Collaboration among businesses, which often consists of no more than a contract between two corporations, can create efficiencies, allow for penetration into new markets, and facilitate the sharing of complementary expertise or necessary market information. Entire sectors of the Nation's service economy, such as law and accounting firms, investment banks, and computer consultants, rely on such arrangements. As this Court has recognized, corporate collaborations "hold the promise of

increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

But attaching the possibility of RICO liability to such collaborations—without requiring more—risks significant deterrence of such beneficial agreements, particularly given that RICO provides for treble damages and attorneys' fees, and in light of the attendant stigma of even an alleged violation. Those beneficial business arrangements would otherwise increase efficiencies and help maintain business competitiveness, which is particularly important in a time of economic uncertainty. Indeed, interpreted in this erroneous manner, RICO encourages consolidation rather than collaboration, because there is less liability for keeping certain functions in-house rather than entering into what might otherwise be a beneficial relationship.

Such economic consequences have no relationship to the abuse that RICO seeks to prevent (or the statute's text), and has been resoundingly criticized by a number of courts. As Judge Posner noted, "[w]e have never heard it suggested that RICO was intended to encourage vertical integration, yet that is the only effect that we can imagine flowing from" a rule that permits RICO claims against a corporation just because it "does business through agents" rather than by itself. *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997).

3. A decision by this Court that affirms the ruling below will lead to the further proliferation of RICO lawsuits against legitimate businesses. Civil RICO has become one of the most frequent and damaging devices used against businesses. Since 2001, a staggering 5,259 civil RICO cases have been filed, only 37 of which were brought by the government. *See Federal Judicial Caseload Statistics*, 2001-2007, Tables C-2 (U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit), at line "RICO," *available at* http://www.uscourts.gov/caseloadstatistics.html (last visited Nov. 25, 2008). These numbers plainly demonstrate what is already obvious: RICO has strayed well beyond its original intent of fighting organized crime. And now this Court is being asked to expand it further beyond its statutory text.

When the association-in-fact enterprise requirement is correctly applied, frivolous RICO actions against legitimate businesses are frequently disposed of due to the plaintiffs' failure to plead adequately or prove an association-in-fact enterprise under the ascertainable structure standard. *See Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752-753 (8th Cir. 2003) (affirming grant of summary judgment for defendants; holding that plaintiffs failed to prove an enterprise with a distinct ascertainable structure for purposes of their RICO claim); *Whelan*, 319 F.3d at 229-230 (affirming dismissal of plaintiffs' RICO claim; finding that plaintiffs failed to demonstrate a RICO enterprise separate from the alleged predicate acts); *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000) (affirming dismissal of plaintiffs' RICO claim; finding plaintiffs' "vague allegations of a RICO enterprise made up of a string of participants, known and unknown, lacking any distinct existence and structure," to be insufficient to state a RICO claim); *Begala v. PNC Bank*, 214 F.3d 776, 781-782 (6th Cir. 2000) (affirming dismissal of plaintiffs' RICO claim; finding that plaintiffs' complaint "essentially lists a string of entities allegedly comprising the enterprise, and then lists a string of supposed racketeering activities in which the enterprise purportedly engages," and holding that the plaintiffs failed to show that the alleged members of the associated-in-fact enterprise engaged in coordinated behavior sufficient to show that they functioned as a continuing unit), *cert. denied*, 531 U.S. 1145 (2001).

Without the "enterprise" standard that Congress required, these types of suits will be forced to go to costly trial, or will settle due to the mere threat of treble damages liability. Indeed, under the erroneous standard articulated by the court of appeals below, a case like *Reves v. Ernst & Young*, 507 U.S. 170 (1993), could yield a different result. There the plaintiffs sought to impose RICO liability on an arrangement between an accounting firm and a farmer's cooperative business. They alleged that the business was the enterprise and the accounting firm was liable under RICO as having "conducted or participated in the conduct of the 'enterprise's affairs,'" *Reves*, 507

U.S. at 185 (emphasis omitted), a burden they could not meet. Under the RICO enterprise standard in the Second Circuit, however, plaintiffs would need to allege only that the accounting firm and the farmer's cooperative, by nature of their contractual relationship, formed an enterprise together and then it could have sued both of them as participants in that enterprise allegedly conducting the affairs of the enterprise through racketeering.

D. If This Court Rejects The Ascertainable Structure Interpretation Of "Enterprise," The Court Should Make Clear That An Association-In-Fact Enterprise Must Be Comprised Of *Individuals*, Not Corporations Or Other Organizations

If this Court concludes that an association-in-fact enterprise requires no ascertainable structure and that the enterprise requirement is satisfied so long as the alleged pattern of racketeering is established, the Court should make clear that its holding applies only to a union or group of individuals—*i.e.*, persons—that form a nonlegal entity. Such a holding is required by the statutory text of Section 1961(4) because that statutory language explicitly states that an association-in-fact enterprise applies only to "any union or group of *individuals*," 18 U.S.C. § 1961(4) (emphasis added), not a corporation or other organization.

As discussed above (*see* Part A *supra*), the first category of the enterprise definition describes legal entity enterprises and lists separately any "individual" and any "corporation." *Id.* § 1961(4). Had Congress intended "individual" to include a "corporation" it would not have included both terms in the definition. *TRW,* 34 U.S. at 31. It follows that when Congress used only "individual" and not "corporation" in the second prong of the enterprise definition (the association-in-fact prong), it did not include corporations within its meaning. *Reves*, 507 U.S. at 177-178 (explaining that Congress does not ordinarily give the identical term two different meanings in the same statute).[5]

Moreover, the context and structure of the RICO statute confirm that Congress intended the term "individual" not to include corporations for purposes of RICO. Congress defined "person" to include "any individual *or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (emphasis added). Congress thus used "individual" in the ordinary sense of the word to mean "an individual human being" and not a corporation or other organization. *Clinton v. New York*, 524 U.S. 417, 428 n.13 (1998) (citing Webster's Third New International Dictionary 1152 (1986)). If Congress intended for the definition of an "individual" to include a corporation or other organization then the term "or entity" would be surplusage in this statutory definition set forth in Section 1961(3). *TRW*, 534 U.S. at 31.

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[5] Some lower courts have cited Congress's use of the term "includes" at the beginning of the "enterprise" definition and held that the list of entities that follows is not meant to be exhaustive. *See, e.g., United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied,* 445 U.S. 927 (1980). This interpretation, however, overlooks the fact that "include" is usually used to "specify particularly" those items that fall within a classification. *Montello Salt Co. v. Utah*, 221 U.S. 452, 466 (1911).

Finally, the definitional provisions of Title 18 of the United States Code, where RICO is codified, explicitly use the term "individual" to exclude organizations. Congress explained that the term "organization" was "a person other than individual." 18 U.S.C. § 18. By providing such a definition, Congress made clear that an "organization" does not mean "individual"; the terms are mutually exclusive. As such, a corporation is a "person" under Title 18 since it is an organization, but it is not an "individual."

In sum, Congress defined the term "enterprise" in RICO to mean (1) a legal entity (including an individual *or* corporation) standing alone and (2) a less formal association in fact that does not constitute a legal entity, but only if such an association is a union or group of "individuals." It would be incongruous to permit an association-in-fact enterprise to be comprised of anything other than individual human beings because a corporation is not an individual under RICO.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and remanded for a new trial.

Respectfully submitted,

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EDMUND BOYLE,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

- I. THE STATUTORY LANGUAGE DEMONSTRATES THAT A RICO ENTERPRISE MUST POSSESS STRUCTURE OR ORGANIZATION INDEPENDENT OF ITS UNDERLYING CRIMINAL ACTS. 6
- II. THE LEGISLATIVE HISTORY OF RICO INDICATES THAT CONGRESS INTENDED AN ENTERPRISE TO POSSESS STRUCTURE OR ORGANIZATION 10
- III. THIS COURT'S INTERPRETATION OF A RICO ENTERPRISE IN OTHER CASES CONTEMPLATES STRUCTURE OR ORGANIZATION 18

IV. ELIMINATING A STRUCTURE REQUIREMENT WILL LEAD TO A HOST OF DELETERIOUS CONSEQUENCES NOT INTENDED BY CONGRESS. 26

A. Weakening the Enterprise Element Creates the Merger Problems Described in *Santos*. 27

B. The Second Circuit's Position Would Transform RICO Into a Recidivist Statute or an Unintentional Federalization of State Crimes 29

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Bachman v. Bear Stearns,
178 F.3d 930 (7th Cir. 1999) 4

Calcasieu Marine Nat'l Bank v. Grant,
943 F.2d 1453 (5th Cir. 1991).................................22

Cleveland v. United States,
531 U.S. 12 (2000)...30

Colautti v. Franklin,
439 U.S. 379 (1979)...7

Dole v. United Steelworkers of America,
494 U.S. 26 (1990)...9

Fitzgerald v. Chrysler Corp.,
116 F.3d 225 (1997) 4

Gutierrez v. Ada,
528 U.S. 250 (2000)...9

H.J., Inc. v. NW. Bell Tel. Co.,
492 U.S. 229 (1989)...21

Iannelli v. United States,
420 U.S. 770 (1975)...11

Jarecki v. G.D. Searle & Co.,
367 U.S. 303 (1961)...9

Kotteakos v. United States,
328 U.S. 750 (1946)...3

Lewis v. United States,
445 U.S. 55 (1980)..6

Limestone Dev. Corp. v. Village of Lemont,
520 F.3d 797 (8th Cir. 2008)...............................9, 23

Nat'l Org. for Women, Inc. v. Scheidler,
510 U.S. 249 (1994)..20, 24

Odom v. Microsoft Corp.,
486 F.3d 541 (9th Cir. 2007)..................................25

Philbrook v. Glodgett,
421 U.S. 707 (1975)..7

Reves v. Ernst & Young,
507 U.S. 170 (1990)..4, 21

Rewis v. United States, 401 U.S. 808 (1971) 10

Richmond v. Nationwide Cassell LP
52 F.3d 640 (7th Cir. 1995)..................................5, 23

Sedima, S.P.R.L. v. Imrex Co., Inc.,
473 U.S. 479 (1985)..20

Stachon v. United Consumers Club, Inc.,
229 F.3d 673 (7th Cir. 2000)....................................4

Tafflin v. Levitt,
493 U.S. 455 (1990)..4

United States v. Anderson,
626 F.2d 1358 (8th Cir. 1980)..........................15, 28

United States v. Bagaric,
706 F.2d 42 (2d Cir. 1983) 8, 24

United States v. Baker,
2008 WL 4056998 (E.D. Mich. Aug. 27, 2008)......27

United States v. Bass,
404 U.S. 336 (1971)...10, 30

United States v. Bledsoe,
674 F.2d 647 (8th Cir. 1982)............................22, 31

United States v. Cagnina,
697 F.2d 915 (11th Cir. 1983)................................25

United States v. Catapano,
2008 WL 4107177 (E.D.N.Y., Aug. 12, 2008)........27

United States v. Cauble,
706 F.2d 1322 (5th Cir. 1983)..................................4

United States v. Hedlund,
2008 WL 4183958 (N.D. Cal., Sep. 9, 2008)..........27

United States v. Kragness,
830 F.2d 842 (8th Cir. 1987)..............3, 5, 22, 23, 28

United States v. Mazzei,
700 F.2d 85 (2d Cir. 1983) 24

United States v. Menasche,
348 U.S. 528 (1955)..6

United States v. Neapolitan,
791 F.2d 489 (7th Cir. 1986).............................3, 23

United States v. Olson,
450 F.3d 655 (7th Cir. 2006)....................................22

United States v. Patrick,
248 F.3d 11 (1st Cir. 2001)......................................25

United States v. Perholtz,
842 F.2d 343 (D.C. Cir. 1988)..................................25

United States v. Rezko,
2008 WL 4890232 (N.D. Ill. Nov. 12, 2008)..........27

United States v. Riccobene,
709 F.2d 214 (3d Cir. 1983)....................3, 22, 23, 26

United States v. Santos,
128 S. Ct. 2020 (2008)...27

United States v. Smith,
413 F.3d 1253 (10th Cir. 2005)...............................22

United States v. Sutherland,
656 F.2d 1181 (5th Cir. 1981)...................................4

United States v. Tillett,
763 F.2d 628 (4th Cir. 1985)...................................22

United States v. Tocco,
200 F.3d 401 (6th Cir. 2000)...................................22

United States v. Turkette,
452 U.S. 576 (1981)..*passim*

United States v. Vastola,
989 F.2d 1318 (3d Cir. 1993)...................................4

United States v. Williams,
128 S. Ct. 1830 (2008)....................9

STATUTES

Title IX of the Organized Crime Control Act of 1970,
Pub. L. No. 91-452, 84 Stat. 941 ....*passim*

18 U.S.C. § 1961 3

18 U.S.C. § 1961(4) 6, 8, 9

18 U.S.C. § 1962(c) 8, 21
18 U.S.C. § 1961(1)....................29

N.Y. Penal Law § 150.05 (1965)....................29

N.Y. Penal Law § 225.10 (1965)....................29

N.Y. Penal Law § 235.06 (1965)....................29

RULES

Supreme Court Rule 37.6....................1

LEGISLATIVE HISTORY

S. REP. 91-617 (1969)....................13, 14, 15

H.R. REP. NO. 91-1549 (1970) 15

Organized Crime Control:
Hearings on S. 30, and related proposals
Before the Subcomm. No. 5 of the
House Comm. on the Judiciary,
91st Cong., 2d Sess. 77 (1970)....................17

116 Cong. Rec. (1970) 15

OTHER AUTHORITIES

The American Heritage Dictionary (4th ed. 2000)...19

Black's Law Dictionary (8th ed. 2004) 8, 19

Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations Act: Basic Concepts–Criminal and Civil Remedies*, 53 Temple L.Q. 1009 (1980) 4

Gerard E. Lynch, *Rico: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661 (1987) 31

John L. McClellan, The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame L. Rev. 55 (1970) 17

Merriam-Webster's Collegiate Dictionary (10th ed. 1993) 19

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime (1967) 12

Report On The Federalization of Criminal Law, Task Force on the Federalization of Criminal Law, American Bar Association Criminal Justice Section (1998) 31

STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a membership of more than 12,800 attorneys and 35,000 affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors.[1] NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights, and has a keen interest in ensuring that criminal proceedings are handled in a proper and fair manner. To promote these goals, NACDL has frequently appeared as *amicus curiae* before the Court in cases concerning substantive criminal law and criminal procedure.

This case presents a question concerning the proper interpretation of RICO that is of vital importance to defense lawyers and criminal defendants. The position taken by the United States in this case, and affirmed below, eliminates an essential element of a RICO offense in certain cases. It will expand the statute's coverage beyond its already imprecise limits and sweep in conduct Congress intended to exclude. NACDL respectfully submits this brief as *amicus curiae* in support of petitioner.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6 *amicus curiae* NACDL states that no counsel for a party authored any part of this brief, and no person or entity, other than NACDL, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the district court instructed the jury that it "may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts." A:771-72. The Second Circuit Court of Appeals subsequently affirmed Petitioner's conviction without discussing the jury instruction or the sufficiency of the evidence regarding the alleged enterprise, presumably relying on its own precedent upholding similar instructions.

As demonstrated herein, the decision of the Second Circuit in this case, and the decisions upon which it relied, are inconsistent with the plain language and legislative history of RICO; with the intent of Congress in enacting RICO; and with decisions of other courts of appeals and this Court construing the statute. The notion that a RICO enterprise need not have a structure or organization apart from the enterprise's underlying crimes themselves would expand RICO from a prohibition against certain federal and state crimes committed in the course of managing the affairs of an ascertainable organization into a sanction against multiple criminality of almost any sort.

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., was enacted in 1970 to address a growing concern over organized criminality and its impact on legitimate businesses. As its name implies, the legislation made a federal felony the commission of certain conduct when that conduct bore a specific relationship to an "Organization." The concept of an "enterprise" affecting interstate commerce not only addressed federal jurisdictional requirements but was a limitation on the statute's scope. The drafters intended RICO to apply only to those patterns of specified crimes which had a statutorily defined effect on an "enterprise," an organization which was either a traditional legal entity or a *de facto* one. *United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("The central role of the concept of enterprise under RICO cannot be overstated. It is precisely the criminal infiltration and manipulation of organizational structures that created the problems which led to the passage of RICO.").

RICO eliminated the necessity for federal prosecutors to prove "a single agreement as in a conspiracy case."[2] Rather, the focus was upon

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[2] *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987); *see also Kotteakos v. United States*, 328 U.S. 750, 755 (1946); *United States v. Riccobene*, 709 F.2d 214, 224-25 (3d Cir. 1983) ("[W]e agree with the Fifth Circuit that Congress intended that 'a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single '"enterprise"' conspiracy' if the defendants have agreed to commit a substantive RICO offense.") (*quoting United States v.*

"enterprise criminality";[3] *i.e.*, broader and more diverse forms of criminal activity in defined relationships with an "enterprise." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1990) (liability "depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs"); *see also Bachman v. Bear Stearns*, 178 F.3d 930, 932 (7th Cir. 1999); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (1997) (Posner, J.) ("RICO, however, is not a conspiracy statute. Its draconian penalties are not triggered just by proving conspiracy. 'Enterprise' connotes more. Just how much more is uncertain . . . ").

Enterprise is an element of a RICO crime, separate and distinct from the other elements, including the requirement of a "pattern of racketeering activity." *See, e.g., United States v. Turkette*, 452 U.S. 576, 583 (1981) ("The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."); *Stachon v. United Consumers*

Sutherland, 656 F.2d 1181, 1192 (5th Cir. 1981)), *abrogation on other grounds recognized by United States v. Vastola*, 989 F.2d 1318, 1330 (3d Cir. 1993).

[3] *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (*citing* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations Act: Basic Concepts–Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1013-14 (1980)). Professor Robert Blakey has been identified by this Court as the "principal draftsman" of the RICO statute. *See Tafflin v. Levitt*, 493 U.S. 455, 461 (1990).

Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000) ("[A] RICO enterprise is 'more than a group of people who get together to commit a pattern of racketeering activity.'") (*quoting Richmond v. Nationwide Cassell LP*, 52 F.3d 640, 645 (7th Cir. 1995)). Finally, a RICO enterprise must be distinct from the underlying predicate criminal offenses. *Kragness*, 830 F.2d at 855.

As Petitioner points out, the Second Circuit has taken a different view of the enterprise element than most other circuits. *See* Petitioner Br. at 6-9. Its decisions, upon which it presumably relied in affirming the judgment in this case, effectively eliminate the statute's enterprise requirement and permit conviction based on evidence that an alleged enterprise is no more than the sum of its predicate acts themselves.

This Court should reverse and hold definitively that a RICO enterprise requires structure apart from a random association of individuals to commit crime. RICO did not and could not create a federal felony for "a pattern of racketeering activity." If an alleged RICO enterprise need not have structure, then the statute's explicit enterprise requirement is meaningless.

ARGUMENT

I. THE STATUTORY LANGUAGE DEMONSTRATES THAT A RICO ENTERPRISE MUST POSSESS STRUCTURE OR ORGANIZATION INDEPENDENT OF ITS UNDERLYING CRIMINAL ACTS.

The starting point for interpreting a statute is the language of the statute itself. *See Turkette,* 452 U.S. at 580; *Lewis v. United States*, 445 U.S. 55, 60 (1980). Absent a clearly expressed legislative intent, that language must ordinarily be regarded as conclusive. *See Turkette,* 452 U.S. at 580.

RICO defines "enterprise" as any of a number of legal entities and then "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The question is whether an association in fact need have none of the attributes of the more formal entities identified in the language which directly precedes it. The answer is not subject to doubt.

A statute must be construed to give effect to all of its provisions. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section, as the Government's interpretation requires." (internal quotation marks and citations omitted)). In construing a statute, the intention of Congress and the meaning of the statute are ascertained by viewing the whole and every part of the statute, in order to give independent effect to each clause and word and to avoid redundancy. *See Colautti v. Franklin,* 439 U.S. 379, 392 (1979); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

In *Turkette,* this Court applied these principles to the same statutory language at issue here and held that "the Government must prove ***both*** the existence of an 'enterprise' ***and*** the connected 'pattern of racketeering activity.'" 452 U.S. at 583 (emphasis added). The Court recognized that the terms refer to two separate and distinct concepts in the statute: "The 'enterprise' is an entity, [ ] a group of persons associated together for a common purpose of engaging in a course of conduct. The 'pattern of racketeering activity' is, on the other hand, a series of criminal acts as defined by the statute." *Id.* The Court reached the obvious conclusion that the "'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages . . . The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.*

The Second Circuit's construction is at odds with these fundamental principles of statutory interpretation and the Court's application of them in *Turkette.* Though ostensibly grounded in *Turkette* (*see infra* Part III), the Second Circuit's position applies "RICO to situations where the enterprise [is], in effect, no more than the sum of the predicate racketeering acts." *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983). The Second Circuit view effectively renders the "enterprise" element of a RICO offense interchangeable with the "pattern of racketeering" element. Pursuant to this view, § 1962(c) becomes internally redundant and important statutory phrases are rendered superfluous.

Indeed, if a RICO "enterprise" could be identified and its existence proven only by reference to commission of a "pattern of racketeering activity," it loses any definitional significance and effectively ceases to be the separate element mandated by Congress. If a "pattern of racketeering activity" can itself be an enterprise, then the statutory phrases "employed by or associated with any enterprise" and "the conduct of such enterprise's affairs [through a pattern of racketeering activity]" add nothing to the meaning of the provision. *See* 18 U.S.C. § 1962(c).

The form of the § 1961(4) definition of "enterprise" invokes the traditional doctrine of statutory construction *noscitur a sociis*, or "it is known from its associates." Pursuant to this doctrine, "the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it." *Black's Law Dictionary* 1060 (8th ed. 2004). As the Court has recognized: "The maxim *noscitur a sociis*, that a word is known by the company it keeps . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).[4]

Applying the doctrine to the § 1961(4) definition of "enterprise," the juxtaposition of the two phrases in the latter portion of § 1961(4) -- *i.e.*, "associated in fact" and "although not a legal entity" -- means that "associated in fact" entities have attributes (such as structure) of the legal entities but not the formal identity. *See, e.g., Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797 (8th Cir. 2008). Congress intended to include within its definition of a RICO enterprise Mafia-style criminal organizations that, by their very nature, lacked the imprimatur of a state recognized partnership or corporation. But at the same time, it required that the separate existence of such criminal enterprises bear some resemblance to such legally recognized organizational forms.

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[4] *See, e.g., United States v. Williams*, 128 S. Ct. 1830, 1839-40 (2008) (utilizing the doctrine of *noscitur a sociis* to find that certain verbs should be interpreted as having a transactional connotation based on the surrounding verbs listed in the statute); *Gutierrez v. Ada*, 528 U.S. 250, 254-55 (2000) (utilizing the doctrine to find that statutory reference to "any election" referred to a gubernatorial election because of the surrounding references to gubernatorial elections); *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (utilizing the doctrine to adopt a narrow interpretation of a term in the Paperwork Reduction Act based on the words surrounding the term); *Jarecki*, 367 U.S. at 307 (utilizing the doctrine to find that the word "discovery" in a statute "gathers meaning from the words around it").

Finally, although *amicus* sees no basis for doubt in the statutory language, the disparate interpretations of it in the circuits compels application of the rule of lenity. Pursuant to this rule, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (*quoting Rewis v. United States*, 401 U.S. 808, 812 (1971)). This time-honored interpretive guideline serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability.[5] *See id* at 347-48.

II. THE LEGISLATIVE HISTORY OF RICO INDICATES THAT CONGRESS INTENDED AN ENTERPRISE TO POSSESS STRUCTURE OR ORGANIZATION.

Were there any doubt about whether an association in fact enterprise must have its own identity, examination of the legislative history and purpose of RICO lays it to rest.

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[5] Although in *Turkette* the Court found that the rule of lenity did not apply in connection with its consideration of RICO, the Court's reasoning in that case is not applicable here. In *Turkette*, the Court declined to apply the rule based on its determination that RICO is unambiguous insofar as it applies to both legitimate and illegitimate enterprises. 452 U.S. at 587 n.10. That is not the issue in this case.

RICO's legislative history does not provide a definitive statement of Congressional intent regarding the precise breadth of the term "enterprise," but it does illuminate the intended meaning of the term. The legislative history makes plain -- and this Court has recognized -- that the primary purpose of § 1962 was to prevent organized crime from infiltrating businesses and other legitimate economic entities. *See Turkette*, 452 U.S. at 591; *Iannelli v. United States*, 420 U.S. 770, 786-87 & n.19 (1975). The legislative history of RICO indicates that Congress intended the statute to deal broadly with the problem of organized crime in all its forms. And for the question before the Court in this case, the emphasis is on "organized."

While the statute's reach is not limited exclusively to Mafia-style organized crime, Congress was legislating a new weapon against it, so the nature of organized crime as Congress understood it is instructive. It included the "association in fact" language in the definition so that true associations would not escape coverage simply because they were not legally recognized entities. Organized crime families are of course not legal entities, and the statute would have had little impact on the problem being addressed if it excluded them.

The President's Commission on Law Enforcement and Administration of Justice (commonly referred to as the "Katzenbach Commission") studied organized crime in the United States from 1965 to 1967. In its report, which received wide attention, it focused extensively on a paper by sociologist Donald Cressey that analyzed the historical roots and contemporary structure of organized crime. *See* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, at 24-60 (1967). Dr. Cressey observed that an "organized criminal" is one who has "committed a crime while occupying an organizational position for committing that crime." *Id.* Dr. Cressey repeatedly used the term "enterprise" to characterize such criminal organizations, and in doing so provided the intellectual underpinning for the term's ultimate inclusion in RICO. *Id.* Later, in a report on the Organized Crime Control Act of 1970, the Senate Judiciary Committee relied heavily on the Katzenbach Commission's report and Dr. Cressey's focus on the structure of organized crime in noting:

> [The Mafia family] organization is rationally designed with an integrated set of positions geared to maximize profits and to protect its members, particularly its leadership, from law enforcement activity. Unlike the criminal gangs of the past, the organization functions regardless of individual personnel changes; no one individual is indispensable.

S. Rep. No. 91-617 at 36 (1969).

That description bears no resemblance to the amorphous band of burglars accused of being an "enterprise" in this case. Without some requirement of structure and continuity, the "crew" identified as the RICO enterprise here is precisely like "the criminal gangs of the past" rather than the more organized and therefore more societally dangerous sophisticated criminal organizations that pose a threat of continued criminal activity. As we demonstrate below, Congress did not intend to cover such groups under RICO and it did not do so.

Congress's focus on organized crime is evident in the "Statement of Findings and Purpose" that prefaced the Act. The Statement noted: "*It is the purpose of this act to seek the eradication of organized crime in the United States* . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (emphasis added). The Statement further provided:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity . . . (2) organized crime derives a major portion of its power through money obtained from . . . illegal endeavors . . . and (5) organized

> crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Id. at 922-23.

Organized crime was the focus of discussion throughout the legislative consideration of the Act precisely because it was organized and had a structure that posed the threat of sophisticated and continuing criminality. The Senate Judiciary Committee report stated that RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce . . . [t]he magnitude of the problem makes it clear that all legitimate methods of combating organized crime must be utilized." S. REP. NO. 91-617 at 76 (1969).

The House Report reflected Congressional intent to reach wholly criminal organizations that lacked *de jure* legal status and noted that the definition of "enterprise" under the Act includes "associations in fact as well as legally-recognized 'associative entities' . . . Thus, infiltration of any associative group can occur." H.R. REP. NO. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4032; *see also* S. REP. 91-617 ("Infiltration of any associative group . . . can be reached."). Similarly conducting the affairs of an enterprise through a pattern of racketeering acts connotes the same necessary relationship between the enterprise and the pattern of crimes. The House Report's reference to "infiltration" and utilization of the term "entities" denote that Congress intended the statute to cover enterprises that have an independent, self-contained existence separate from the enterprise's pattern of racketeering activity. *See United States v. Anderson*, 626 F.2d 1358, 1371 (8th Cir. 1980). Carrying out a limited number of racketeering activities on an ad hoc basis simply cannot establish the existence of an "entity" capable of "infiltration."

Floor debates reveal the same focus. Senator Hruska, co-sponsor of the bill that ultimately became the RICO statute, explained that "[w]e must give no mercy to the soldiers of organized crime." 116 Cong. Rec. 602 (1970). Senator Yarborough affirmed, "[i]t is time for us to muster our forces and fight to save our society, through a full-scale attack on organized crime." *Id.* And Representative Rodino later emphasized: "Drastic methods to combat . . . [organized crime] are essential, and we must develop law enforcement measures at least as efficient as those of organized crime . . . [The Act will provide] the basis for an effective national program and generate a truly full-scale commitment to destroy the insidious power of organized crime groups" *Id.* at 35199.[6]

At the same time, Congress understood the danger of potentially limitless coverage and believed that the creation of a crime based on relationships between actors and enterprises would prevent unintended applications such as the one at issue here.

Representative Celler, Chairman of the House Subcommittee that considered the Act, stated at the outset of the Subcommittee hearings:

> [W]e must take care to identify those types of criminal offense which we classify as "organized crime." The need to define the target of this legislation and to circumscribe the reach of the substantive as well as the procedural

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[6] Congress's concern with organized crime was also noted in remarks by Representative McDade, 116 Cong. Rec. at 35216 ("[O]rganized crime presents a direct threat to a nation which seeks to restore a sense of dignity and majesty to the law"); Senator Scott, *id.* at 819 ("[RICO's] purpose is to eradicate organized crime in the United States"); Representative Mayne, *id.* at 35300 (stating organized crime "must be sternly and irrevocably eradicated"); Representative Brotzman, *id.* at 35309 ("Organized crime has become a cancerous element in our society which must be eradicated"); and Representative Sikes, *id.* at 35310 ("Congress should leave no stone unturned in our efforts to insure that every step within our power has been taken to curb this growing threat to the domestic peace and to the internal security of the Nation").

> provisions is underscored by [a statement from the 1967 report of the President's Commission on Law Enforcement and Administration of Justice] . . . Thus, when we speak of "organized crime" we must not generalize -- we must define our terms and focus on specifics. Comparable precision is essential in developing a federal legislative program to eradicate organized crime.

Organized Crime Control: Hearings on S. 30, and related proposals Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 77 (1970). And Senator McClellan observed:

> The danger that a commission of such offenses by other individuals would subject them to proceedings under title IX is (small) . . . since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under title IX.

John L. McClellan, *The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame L. Rev. 55, 144 (1970).

It is of course well established by now that RICO is not limited to organizations like the Mafia. Its plain language and numerous decisions have settled that question. That RICO was intended to be a flexible weapon to combat emerging forms of organized crime does not mean that Congress intended the statute to apply when criminals were not "organized" or that evidence at a trial need not prove the enterprise has a structure separate from the criminal acts themselves. This Court should now eliminate any confusion or doubt on these questions.

III. THIS COURT'S INTERPRETATION OF A RICO ENTERPRISE IN OTHER CASES CONTEMPLATES STRUCTURE OR ORGANIZATION.

During this Court's long history of interpretation of the unique elements of a RICO offense, it has defined an overall structure of the statute and interpreted Congress's use of its key terms. The Court's interpretation of the meaning of the central statutory term "enterprise" when clarifying other key statutory terms demonstrates that the Second Circuit's approach not only misconstrues the enterprise element but also upsets the carefully crafted balance this Court has emphasized among RICO's key elements. Requiring an enterprise to have structure maintains enterprise and pattern as separate elements and properly targets individuals who infiltrate legitimate organizations or conduct their affairs through racketeering activity.

This Court's early decision in *Turkette* provided a rationalized view of the entire statute. It focused on the critical relationship between the pattern and enterprise elements which it emphasized were separate. The companion requirement of an enterprise with ongoing structure and organization is inherent in this separateness. In concluding that this statutory definition of a RICO enterprise embraces wholly criminal organizations, the Court described such an organization as "*an entity*," proof of which is established "by evidence of *an ongoing organization*, formal and informal, and by evidence that the various associates function as *a continuing unit*." *Id.* at 583 (emphasis added). Structure is implicit in the notions of continuity and organization.[7]

In addition, the Court specifically distinguished the "enterprise" element from the "pattern" element and identified the relationship between them, noting that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." *Id.* In contrast to an enterprise, a pattern "is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise." *Id.* In a phrase frequently quoted by lower courts, this Court noted that "[w]hile the proof used to establish these separate elements may in particular cases coalesce, *proof of one does not necessarily establish the other.*" *Id.* (emphasis added). The distinction between a pattern and an enterprise was emphasized yet again when this Court concluded by stating: "[T]he existence of an enterprise *at all times* remains a separate element which must be proved by the Government." *Id.* (emphasis added). This same principle has been repeatedly recognized by the Court's post-*Turkette* cases addressing other RICO elements. *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985).

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[7] *Compare Black's Law Dictionary* 573, 1133 (8th ed. 2004) (defining "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members" and an "organization" as a "body of persons (such as a union or corporation) formed for a common purpose") *with The American Heritage Dictionary* (4th ed. 2000) (defining "structure" as "[s]omething made up of a number of parts that are held or put together in a particular way") *and Merriam-Webster's Collegiate Dictionary* 1167 (10th ed. 1993) (defining "structure" as "something arranged in a definite pattern of organization" and "organization of parts as dominated by the general character of the whole").

Separate "pattern" and "enterprise" elements are not only inherent in the language and structure of RICO but are also consistent with RICO's underlying preventive purpose. *Turkette* recognized RICO's "preventive" purpose and Congressional concern with organized crime's infiltration of legitimate businesses. *Id.* at 593. An enterprise need not be legitimate to fall under RICO because a criminal enterprise also poses an ongoing threat as it acquires money and power. *See id.* Thus, the concern was not simply that some organization exist but also that it function as a "continuing unit." *Id.* at 583. This concern is echoed in *H.J.* where the Court added further definitional clarity to the "pattern" element and concluded that a pattern requires not only a relationship between predicate acts but also a "threat of continuing activity." *H.J., Inc. v. NW. Bell Tel. Co.*, 492 U.S. 229, 239 (1989). "Congress was concerned in RICO with long term criminal conduct." *Id.* at 242.

The ability of an organization to pose an ongoing threat was at the core of *Turkette.* It recognized that once an enterprise develops some revenue and power, it can use that power "as a springboard into the sphere of legitimate enterprise." *Turkette*, 452 U.S. at 591. In other words, an enterprise that is organized enough to develop this power presents an ongoing threat of long term criminal conduct. *Turkette's* definition of an enterprise was meant to capture those organizations that pose such an ongoing threat.

The Court's recognition of Congressional concern about the ongoing activities of an enterprise is also reflected in *Reves*, 507 at 170. *Reves* held that the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" in section 1962(c) means that a person must participate in the operation or management of an enterprise. *Id.* at 185. *Reves's* test finds support in RICO's purpose of prohibiting the infiltration of legitimate organizations. Id. at 180-81. Accordingly, prosecutors must show that defendants operated or managed "'the *enterprise's* affairs,' not just their *own* affairs." *Id.* (emphasis in original). If the enterprise is simply an amorphous pattern of activities, it has no affairs and there is no way to identify the ongoing enterprise as separate and managed by the individuals. The operation-management test has meaning only when there is an enterprise with affairs of its own that an individual can manage. Structure is a necessary part of determining when there is such an entity.

The Third,[8] Fourth,[9] Fifth,[10] Sixth,[11] Seventh,[12] Eighth,[13] and Tenth[14] Circuits require evidence of some level of structure to prove the existence of an enterprise. For example, the Third Circuit has concluded that "[t]here must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than an ad hoc, basis." *Riccobene*, 709 F.2d at 222. *Accord Smith*, 413 F.3d at 1266-67 (adopting the *Riccobene* framework). Thus, the Third Circuit requires that, "[t]o satisfy this [ongoing organization] element, the government must show that some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual." *Riccobene*, 709 F.2d at 222.[15]

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[8] *Riccobene*, 709 F.2d at 222.

[9] *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985).

[10] *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991).

[11] *United States v. Tocco*, 200 F.3d 401, 425 (6th Cir. 2000).

[12] *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006).

[13] *Kragness*, 830 F.2d at 855; *United States* v. *Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982).

[14] *United States v. Smith*, 413 F.3d 1253, 1266-67 (10th Cir. 2005).

The structure requirement that these circuits have articulated flows naturally from *Turkette* and *H.J.* Indeed, these circuits found their structure requirements in the language of *Turkette*. The Third Circuit, for example, first identified a structure requirement when explaining how each of the enterprise elements enumerated in *Turkette* must be demonstrated to prove an enterprise. *Riccobene*, 709 F.2d at 222. Likewise, the Seventh Circuit noted that it was "[e]choing" the language of *Turkette* when it concluded that there must be proof of an ongoing structure to prove an enterprise. *Limestone Dev. Corp.*, 520 F.3d at 805. These courts, and the five others like them, have followed the natural meaning of *Turkette's* discussion of an "entity" with an "ongoing organization" in identifying an important element of an enterprise that makes it distinct—structure. *See, e.g., Neapolitan*, 791 F.2d at 500 ("While the hallmark of conspiracy is agreement, the central element of an enterprise is structure. An enterprise must be more than a group of people who get together to commit a 'pattern of racketeering activity.'").

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[15] *Accord Limestone Dev. Corp.*, 520 F.3d at 805 ("'[E]nterprise' requires proof of 'an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making.') (*quoting Richmond*, 52 F.3d at 644)); *Kragness*, 830 F.2d at 856 (finding continuity of structure in an enterprise "exists where there is an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuing, rather than an ad hoc, basis.").

The Second Circuit has failed to identify the true meaning of *Turkette*, and has misinterpreted its language to reject a structure requirement. The Second Circuit's decisions permit conviction "where the enterprise was, in effect, no more than the sum of the predicate racketeering acts." *Bagaric*, 706 F.2d at 55, *abrogated on other grounds by Nat'l Org. for Women*, 510 U.S. at 249. One such decision is *United States v. Mazzei*, where the court relied in part upon this Court's statement that evidence proving an enterprise and a pattern "may coalesce." 700 F.2d 85, 89, 90 (2d Cir. 1983) (*cited in Bagaric*, 706 F.2d at 55). The court ignored the second half of this "coalesce" sentence: "proof of one does not necessarily establish the other." *Turkette*, 452 U.S. at 583. That the evidence may at times coalesce acknowledges the common-sense notion that the same evidence can prove two different and necessary elements; it does not mean that the elements are the same. The Second Circuit permits mere evidence of a pattern to prove an enterprise and considers it "logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure." *Bagaric*, 706 F.2d at 56 (emphasis in original). Doing so ignores *Turkette's* definition of an enterprise as separate from a pattern and this Court's recognition of Congressional concern about ongoing enterprises.

Other circuits following the Second Circuit's lead also fail to offer sufficient reasons to justify the outcome. The District of Columbia Circuit does not reject any distinction between a pattern and an enterprise, but by allowing the same evidence to prove both, it reaches the same result. The District of Columbia Circuit acknowledges *Turkette's* admonition that the elements are separate and even identifies "'organization' or 'structure'" as an element needed to prove an enterprise. *United States v. Perholtz*, 842 F.2d 343, 362-63 (D.C. Cir. 1988) (per curiam). The *Perholtz* opinion, however, allows organization to be inferred from a pattern. *Id.* at 363. It fails to give the structure requirement the independent significance required by *Turkette* and will conflate the pattern and enterprise elements.

Likewise, the First, Ninth, and Eleventh Circuits offer no compelling reasons for rejecting a structure requirement. The Eleventh Circuit relied upon its pre-*Turkette* cases when it misconstrued *Turkette's* requirement of an "ongoing organization, formal or informal" to remove all need to prove structure. *See United States v. Cagnina*, 697 F.2d 915, 920-21 (11th Cir. 1983). The Ninth Circuit based its decision on its mistaken belief that an ascertainable structure requirement would require "that the enterprise have a structure serving both illegitimate and legitimate purposes." *Odom v. Microsoft Corp.*, 486 F.3d 541, 551-52 (9th Cir. 2007) (en banc). It found support in the First Circuit's decision of *United States v. Patrick*, 248 F.3d 11, 19 (1st Cir. 2001), where the First Circuit observed both that proof of an enterprise and pattern may coalesce and that criminal enterprises "may not observe the niceties of legitimate organizational structures." As we have demonstrated, this reasoning is unpersuasive. The structure requirement does not require all of "the niceties of legitimate organizational structures" but it does require more than a random association of individuals who commit crimes together. *See, e.g., Riccobene*, 709 F.2d at 222.

This case provides the appropriate vehicle to resolve the inconsistency among the circuits and to make clear that the minority holdings are not correct. A structure requirement is a logical explication of this Court's precedent and necessary to safeguard the integrity of the enterprise element. Without a structure requirement, the "requisite number of acts of racketeering" is all that is needed to prove not only a pattern but also an enterprise. *See Turkette*, 452 U.S. at 583. The decision under review here permitted the jury to find that predicate acts proved an enterprise. That was error. Proving a pattern only demonstrates that some individuals committed more than one crime; it does not demonstrate an enterprise.

IV. ELIMINATING A STRUCTURE REQUIREMENT WILL LEAD TO A HOST OF DELETERIOUS CONSEQUENCES NOT INTENDED BY CONGRESS.

The Second Circuit's construction would effectively read the separate enterprise element out of the statute for enterprises in fact. In that event, RICO would effectively merge with the predicate offenses, federalize state crimes, and become the functional equivalent of a recidivism statute. None of these outcomes serves RICO's purpose and all are unintended and undesirable.

A. Weakening the Enterprise Element Creates the Merger Problems Described in *Santos.*

RICO and its predicate offenses will impermissibly merge if an enterprise can be proven by a pattern. The prospect of the merger of two criminal statutes with vastly disparate punishments was an important consideration in *United States v. Santos*, 128 S. Ct. 2020 (2008).[16] In determining that a more narrow definition of the term "proceeds" in the federal money-laundering statute was appropriate, this Court noted that a broader reading of the term could result in the merging of two criminal statutes with disparate penalties. *Santos*, 128 S. Ct. at 2026 (plurality opinion).[17] The same effect would result here: Eliminating (or in some cases even watering down) the enterprise element would cause RICO to merge with predicate offenses at least when they are committed in a "pattern." The salient difference between RICO and the predicate offenses -- proof of an enterprise separate from the coordination necessary to carry out the crimes -- would no longer prevent these offenses from merging.[18]

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[16] Indeed, many federal district courts have placed importance on *Santos*'s discussion of this "merger problem" since its issuance earlier this year. *See United States v. Hedlund*, No. CR-06-346-DLJ, 2008 WL 4183958 (N.D. Cal. Sep. 9, 2008); *United States v. Rezko*, No. 05 CR 691, 2008 WL 4890232 (N.D. Ill. Nov. 12, 2008); *United States v. Baker*, No. 06-cr-20663, 2008 WL 4056998 (E.D. Mich. Aug. 27, 2008); *United States v. Catapano*, No. CR-05-229, 2008 WL 4107177 (E.D.N.Y. Aug. 12, 2008).

[17] Justice Stevens's concurring opinion limited the reach of *Santos*'s holding regarding the scope of the term "proceeds" in the federal money-laundering statute, but he, like the plurality, also addressed the merger problem in coming to his conclusion. *See id.* at 2033-34 (Stevens, J., concurring).

RICO's merger with its predicate offenses would have far-reaching and unintended consequences. Merger "radically increase[s] the sentence" for acts that are punished elsewhere in the federal criminal code, and it also affects other aspects of criminal liability, including charging decisions and plea-bargaining. *Id.* at 2027, 2028. There is no indication that Congress intended to create such results any time two predicate acts are committed by any two people. Congress intended, rather, to provide an enforcement mechanism for that theretofore unprosecutable group of separate crimes which relate to or involve an organization. *See supra* Part II. The distinction between an enterprise and a pattern is necessary to respect this legislative intent and avoid the problem of merger.

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[18] A number of courts have recognized that the enterprise element is an important consideration in addressing double jeopardy concerns under the Fifth Amendment. *See, e.g.*, *Kragness*, 830 F.2d at 863-64 (acknowledging RICO's enterprise requirement in rejecting a double jeopardy claim). Indeed, the Eighth Circuit has even noted that "[t]he 'enterprise' element provides an essential ingredient in the constitutionality of the composition and structure of a section 1962(c) offense." *Anderson*, 626 F.2d at 1367. The weakening of the enterprise element could thus alter the conclusions of the many courts that have determined that RICO currently does not present double jeopardy concerns.

B. The Second Circuit's Position Would Transform RICO Into a Recidivist Statute or an Unintentional Federalization of State Crimes.

Because RICO's list of predicate acts includes a broad range of state law criminal offenses, a pattern can be composed exclusively of such offenses. Accordingly, if an enterprise distinct from such a state law pattern is not required, RICO would federalize the commission of two or more designated state offenses for being committed in a pattern. For example, in New York, fourth-degree arson, first-degree gambling promotion, and second-degree obscenity are all Class E Felonies, punishable by up to four years imprisonment. N.Y. Penal Law § 150.05 (1965); N.Y. Penal Law § 225.10 (1965); N.Y. Penal Law § 235.06 (1965). Federal law does not reach most criminal acts that would fall within these state statutes, but under RICO, it reaches all of them. *See* 18 U.S.C.A. § 1961(1) (1970). Elimination of a meaningful enterprise element would create federal jurisdiction over any set of those crimes committed by a common group of individuals.[19]

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[19] RICO would also become little more than a sentencing enhancement for the predicate offenses if an enterprise can be proven by demonstrating a pattern. The same conduct resulting in a maximum penalty of eight years imprisonment for committing two Class E Felonies in New York would be transformed into an additional maximum penalty of twenty years imprisonment under RICO whenever two individuals commit two of those crimes together.

This Court has cautioned that it can not be lightly inferred that Congress intended to alter the balance of federal and state powers. *See Bass*, 404 U.S. at 349-50 (1971). Although Congress intended to somewhat alter that balance with RICO, as in *Bass*, "the legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal state balance *in the way now claimed* by the Government." *Id.* at 350 (emphasis added). RICO's intended federalization was limited to that necessary to combat organized crime. *See* Part II, *supra*. There is no indication that Congress intended to go farther. *See Cleveland v. United States*, 531 U.S. 12, 25 (2000) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.") (internal citations omitted).

Unless the prosecutor must prove an enterprise, the ability to prosecute state predicate crimes in federal courts has no ascertainable limits. It would bring the power and responsibility of federal law enforcement to a host of crimes for which there is otherwise no federal jurisdiction and that have traditionally been the province of states. It will make punishment for the same or similar conduct depend on whether the conduct is charged by federal or state prosecutors.[20]

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[20] In 1997, the Criminal Justice Section of the American Bar Association created a Task Force in response to widespread concern about the increasing federalization of American criminal law that has been occasioned, at least in part, by expansive interpretation of RICO. The Task Force was chaired

RICO is not and was not intended to be a recidivist statute and was certainly not intended to alter the federal state balance to the extent the Second Circuit would permit.[21]

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by former U.S. Attorney General Edwin Meese III. The Task Force's final report (commonly known as the "Meese Report"), issued in 1998, identified a host of adverse consequences caused by inappropriate federalization of criminal law, including, *inter alia,* (i) diminution of the state judicial system and creation of concomitant strain on the resources of the federal system; (ii) creation of inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution; (iii) diminution of a principled basis for selecting a case as a federal or local crime with its attendant divergent consequences; and (iv) an increase in unreviewable federal prosecutorial discretion. *See Report On The Federalization of Criminal Law* at 26-43, Task Force on the Federalization of Criminal Law, American Bar Association Criminal Justice Section (1998).

[21] *See, e.g., Bledsoe*, 674 F.2d at 659; Gerard E. Lynch, *Rico: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 721 (1987) ("Because [RICO] is triggered by a wide variety of crimes, and because the preconditions for its invocation are present in a wide range of cases, its availability is far less limited than that of typical special offender or recidivist statutes."). This also greatly enhances the sentencing power of federal prosecutors. *See id.* at 720-21.

CONCLUSION

For the foregoing reasons, and those presented by Petitioner, the decision below should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 07-1309

In The
Supreme Court of the United States

◆

EDMUND BOYLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

◆

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENT

◆

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

- I. AN ASSOCIATION-IN-FACT RICO ENTERPRISE DOES NOT REQUIRE PLEADING OR PROOF OF AN "ASCERTAINABLE STRUCTURE" 2
  - A. Introduction 2
  - B. The Statutory Definition Of "Enterprise" Does Not Require The Government Or Civil RICO Plaintiff To Plead And Prove The Existence Of An "Ascertainable Structure" 9
  - C. Nothing In RICO's Legislative History Requires Pleading Or Proof That The "Enterprise" Has An "Ascertainable Structure" 14
  - D. Petitioner's Arguments Are Contrary To The Substance And Meaning Of This Court's Decision In *Turkette* 16
  - E. The Lower Courts Have Properly Applied The Three Factors Enumerated By This Court In *Turkette* To Determine Whether RICO Association-In-Fact Enterprises Have Been Alleged And/Or Proven Without Reference To An "Ascertainable Structure" Requirement 24

TABLE OF CONTENTS – Continued

Page

F. Petitioner's Arguments Are Contrary To RICO's Purpose And Public Policy 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Anza v. Ideal Steel Supply Co., 547 U.S. 451 (2006) 10

Asa-Brandt, Inc. v. ADM Investor Svcs., Inc., 344 F.3d 738 (8th Cir. 2003) 21

Atlas Pile Driving Co. v. DiCon Finan. Co., 886 F.2d 986 (8th Cir. 1989) 28

Beck v. Prupis, 529 U.S. 494 (2000) 10

Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008) 10, 23

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001) 6, 10, 23

City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425 (2d Cir. 2008) .... *passim*

Dolan v. U.S. Postal Svc., 546 U.S. 481 (2006) 13

Dubai Islamic Bank v. Citibank, N.A., 126 F. Supp. 2d 659 (S.D.N.Y. 2000) 6

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95 (1941) 11

H.J. Inc. v. Northwestern Bell Tele. Co., 492 U.S. 229 (1989) 3, 8

Helvering v. Morgan's, Inc., 293 U.S. 121 (1934) ... 11, 12

Humana Inc. v. Forsyth, 525 U.S. 299 (1999) 10

In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917) 27

In re Sumitomo Copper Litig., 104 F. Supp. 314 (S.D.N.Y. 2000) 6

Page

Limestone Dev. Corp. v. Village of Lemont, 520 F.3d 797 (7th Cir. 2008) 6, 21

McClulloch v. Maryland, 17 U.S. 17 (Wheat.) 316 (1819) 13

McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985) 28

National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 4, 8, 14

Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.), *cert. denied*, 128 S. Ct. 464 (2007).........*passim*

PacifiCare Health Systems, Inc. v. Book, 538 U.S. 401 (2003)...10

Reves v. Ernst & Young, 507 U.S. 170 (1993)............12

Richmond v. Nw. Cassel L.P., 52 F.3d 640 (7th Cir. 1995)..21

Rotella v. Wood, 529 U.S. 494 (2001)........................10

Scheidler v. Nat'l Org. for Women, 547 U.S. 9 (2006)...10

Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256 (2d Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) 7

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)..3, 4, 13

Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985) 6

Page

United Healthcare Corp. v. Am. Trade Ins. Co., 88 F.3d 563 (8th Cir. 1996) 26

United States v. Angelilli, 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982) 30

United States v. Bagaric, 706 F.2d 42 (2d Cir. 1983), *abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249 (1994) 22

United States v. Bledsoe, 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982) 22, 23

United States v. Cagnina, 697 F.2d 915 (11th Cir. 1983) 22

United States v. Cianci, 378 F.3d 71 (1st Cir. 2004) ....*passim*

United States v. Connolly, 341 F.3d 16 (1st Cir. 2003) 26

United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992) 30

United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) 20

United States v. Eppolito, 543 F.3d 25 (2d Cir. 2008) 25

United States v. Feldman, 853 F.2d 648 (9th Cir. 1988) 29

United States v. Goldin Indus., 219 F.3d 1271 (11th Cir.), *cert. denied*, 531 U.S. 1015 (2000) 7, 20

Page

United States v. Huber, 603 F.2d 387 (2d Cir. 1979) 12

United States v. Kehoe, 310 F.3d 579 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003) 26

United States v. Lee Stoller Enters., Inc., 652 F.2d 1313 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981) 4

United States v. London, 66 F.3d 1227 (1st Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996) 4, 12

United States v. Masters, 924 F.2d 1362 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991) 4, 28, 29

United States v. Mazzei, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983) 27

United States v. McDade, 28 F.3d 283 (3d Cir. 1994), *cert. denied*, 455 U.S. 910 (1982) 30

United States v. Monsanto, 491 U.S. 600 (1989) 13

United States v. Nascimento, 491 F.3d 25 (1st Cir. 2007), *cert. denied*, 128 S. Ct. 1738 (2008) 5, 22, 24, 26

United States v. Patrick, 248 F.3d 11 (1st Cir. 2001), *cert. denied*, 535 U.S. 910 (2002) 5, 24

United States v. Perholtz, 842 F.2d 343 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988) 4, 22, 28, 29

United States v. Riccobene, 709 F.2d 214 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983) 5, 21

United States v. Rogers, 89 F.3d 1326 (7th Cir.), *cert. denied*, 519 U.S. 999 (1996) 21, 26, 28

TABLE OF AUTHORITIES – Continued

Page

United States v. Russello, 464 U.S. 16 (1983)............12

United States v. Sanders, 928 F.2d 940 (10th Cir.), *cert. denied*, 502 U.S. 845 (1991)..................21

United States v. The Malek Adhel, 43 U.S. (2 How.) 210 (1844)...11

United States v. Thevis, 665 F.2d 616 (5th Cir.), *cert. denied*, 459 U.S. 825 (1982)..........................16

United States v. Tillett, 763 F.2d 628 (4th Cir. 1985)...21

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)...22

United States v. Turkette, 452 U.S. 576 (1981) ...*passim*

United States v. Warner, 498 F.3d 666 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2500 (2008)............12

STATUTES

18 U.S.C. § 1961(3)..6, 11

18 U.S.C. § 1961(4)..*passim*

18 U.S.C. § 1962(c)......................................3, 7, 12, 16

18 U.S.C. § 1964(c)...2

18 U.S.C. §§ 1961-1968......................................*passim*

RULES

Fed. R. Civ. P. 8(a)..5, 6

Sup. Ct. R. 37.3(a)..1

Page

OTHER AUTHORITIES

Edward Gross & Amitai Etzonini, ORGANIZATIONS IN SOCIETY (1985) 13

G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God is This the End of RICO?,"* 43 VAND. L. REV. 851 (1990) 29

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947) 9

G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernest & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO,* 33 AM. CRIM. L. REV. 1345 (1996) 9

G. Robert Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982) 30

H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007 15

Henry Friendly, BENCHMARKS 202 (1976) 9

II Thomas A. Russell, ed., BENEDICT ON ADMIRALTY § 21 (7th ed. 2005) 11

III Roscoe Pound, JURISPRUDENCE, 488-490 (1959) 9

James B. Jacobs, BUSTING THE MOB: THE UNITED STATES V. COSA NOSTRA (1994) 21

Page

John E. Floyd, RICO State by State: A Guide to Litigation under the State Racketeering Statutes (Am. Bar Ass'n 1998) 2

Joseph Heller, Catch-22 (Dell 1985) 6

Julie Gunnigle, *Birds of a Feather RICO: Trying Partners in Crime Together,* 34 Syracuse J. Int'l L. & Com. 41 (2006) 21

Paul Edgar Harold, *Quo Vadis, Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provisions in Criminal and Civil Cases (With a Little Statutory Background to Explain Why),* 80 Notre Dame L. Rev. 781 (2005) 10

President's Commission on Organized Crime, The Impact, Organized Crime Today (1986) 21

Reed Dickerson, The Fundamentals of Legal Drafting, § 7.2 (1965) 11

S. Rep. No. 91-617, 91st Cong., 1st Sess. 160 (1969); 115 Cong. Rec. 9567 (1969) 14

Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept,* 64 Notre Dame L. Rev. 646 (1989) 17

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Shareholder and Consumer Attorneys (NASCAT) is a nonprofit membership organization. Its members (including law firms and solo practitioners) represent parties in antitrust, commercial, consumer protection, employee benefit and pension, civil racketeering and securities fraud cases. NASCAT's members, who represent victims of corporate abuse, schemes to defraud and white-collar criminal activity, seek to secure compensation, deter wrongdoers, modify corporate behavior and improve access to justice. We advocate the enforcement of state and federal laws to prevent wrongful, fraudulent and manipulative business practices. NASCAT is interested in this case because even though Petitioner appeals from a criminal conviction, it necessarily implicates civil liability under the Racketeer Influenced and Corrupt Organizations Act

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[1] Letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, as required by Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

("RICO"), 18 U.S.C. §§ 1961-1968, and "little RICO" statutes enacted in a majority of the states.[2]

◆

ARGUMENT

I. AN ASSOCIATION-IN-FACT RICO ENTERPRISE DOES NOT REQUIRE PLEADING OR PROOF OF AN "ASCERTAINABLE STRUCTURE"

A. Introduction

Enacted in 1970 as Title IX of the Organized Crime Control Act, RICO provides for both criminal and civil liability. Pub.L. No. 91-452, § 901, 84 Stat. 922 (1970), *codified at* 18 U.S.C. §§ 1961-1968. Civil RICO provides for treble damages. 18 U.S.C. § 1964(c). In this case, Petitioner was convicted at trial of violating Section 1962(c) of RICO, which provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of

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[2] A majority of the states and U.S. territories have enacted "little RICO" statutes that are, to a greater or lesser extent, modeled after the federal statute. *See* John E. Floyd, RICO STATE BY STATE: A GUIDE TO LITIGATION UNDER THE STATE RACKETEERING STATUTES (Am. Bar Ass'n 1998) (extensive comparison of state and federal RICO laws).

> such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

To state liability for a claim under Section 1962(c), the Government or a civil RICO plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 (1985); *accord Odom v. Microsoft Corp.,* 486 F.3d 541, 547 (9th Cir.), *cert. denied,* 128 S. Ct. 464 (2007). The necessary elements for liability for a criminal RICO conviction are the same. *See, e.g., H.J. Inc. v. Northwestern Bell Tele. Co.,* 492 U.S. 229, 236 (1989) ("pattern" element "appl[ies] to criminal as well as civil applications"); *accord Sedima*, 473 U.S. at 489 ("violation"). The only question presented in this appeal is the second element – "enterprise" – of a Section 1962(c) criminal prosecution or civil claim when based on an "association-in-fact" theory.

The definition of "enterprise" in RICO is straightforward. In its entirety, the definition is: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, ***and any union or group of individuals associated in fact although not a legal entity***." 18 U.S.C. § 1961(4) (emphasis added). As is evident from the plain text, this definition is hardly demanding. A single "individual" is an enterprise. Similarly, a single "partnership," a single "corporation," a single "association," and a single "other legal entity" are enterprises. *See Odom,* 486 F.3d at 548.

This Court admonishes courts to construe RICO and, in particular, "enterprise" expansively. *See National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 257 (1994) ("*NOW*") ("RICO broadly defines 'enterprise'"); *United States v. Turkette,* 452 U.S. 576, 586-587 (1981); *Sedima,* 473 U.S. at 497-98. With few exceptions, the circuit courts of appeals adhere to this admonition. *See, e.g., City of New York v. Smokes-Spirits.Com, Inc.,* 541 F.3d 425, 447 (2d Cir. 2008); *Odom,* 486 F.2d at 547; *United States v. Cianci,* 378 F.3d 71, 78-79 (1st Cir. 2004); *United States v. London,* 66 F.3d 1227, 1243-1244 (1st Cir. 1995), *cert. denied,* 517 U.S. 1155 (1996); *United States v. Lee Stoller Enters., Inc.,* 652 F.2d 1313, 1318 (7th Cir.), *cert. denied,* 454 U.S. 1082 (1981). Congress gave the term great flexibility by using the word "includes" rather than "means"; thus, its definition is illustrative, not exhaustive. *See United States v. Masters,* 924 F.2d 1362, 1366 (7th Cir.) (Posner, J.), *cert. denied,* 500 U.S. 919 (1991); *United States v. Perholtz,* 842 F.2d 343, 353 (D.C. Cir.), *cert. denied,* 488 U.S. 821 (1988). Accordingly, courts properly interpret "enterprise" to include (1) legal entities, that is, legitimate business partnerships or corporations, ***and*** (2) illegitimate associations-in-fact, marked by an ongoing formal ***or*** informal organization of individual or legal-entity associates, *see Cianci,* 378 F.3d at 79, who or which function as a continuing unit "for a common purpose of engaging in a course of conduct."

Turkette, 452 U.S. at 580-583; *see also United States v. Patrick,* 248 F.3d 11, 19 (1st Cir. 2001), *cert. denied,* 535 U.S. 910 (2002). The enterprise charged in this case is of the illegitimate associated-in-fact variety and "[w]hat is disputed is the manner in which a group must be associated." *Odom,* 481 F.3d at 548.

NASCAT respectfully submits that the answer to this question was decided by this Court more than a quarter-century ago in *Turkette,* 452 U.S. at 580-593. Carefully examining RICO's language (*id.* at 580-587), legislative history (*id.* at 588-593), and purpose (*id.* at 593), this Court – with a lone dissent – articulated the evidentiary criteria for an associated-in-fact enterprise under RICO. To establish ("prove") the existence of such an enterprise at trial, the Government (or civil RICO plaintiff) must offer "evidence of an ongoing organization, formal or informal," and "evidence that the various associates function as a continuing unit." *Id.* at 583. This Court required no other evidentiary showing. *See id.; see also City of New York,* 541 F.3d at 447; *Odom,* 486 F.3d at 552.[3] As set

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[3] In *Turkette,* 452 U.S. at 583, this Court spoke repeatedly of what must be "***proved***" at trial – not what must be ***alleged*** or ***pled***. *See id.* (referring to what "the Government must ***prove***"; "***proved*** by evidence"; "***proof*** used to establish"; "***proof*** of one"; and "must be ***proved*** by the Government."). *Id.* (emphasis added; footnote omitted); *see also United States v. Nascimento,* 491 F.3d 25, 32 (1st Cir. 2007) (quoting *Turkette*), *cert. denied,* 128 S. Ct. 1738 (2008); *United States v. Riccobene,* 709 F.2d 214, 222 (3d Cir.), *cert. denied,* 464 U.S. 849 (1983). *Turkette* says nothing about what must be ***alleged*** by the Government or civil RICO plaintiffs. Consistent with Rule 8(a) of the Federal Rules

(Continued on following page)

forth herein, the majority of the circuits faithfully adhere to the criteria enumerated in *Turkette,* 452 U.S. at 583. In practice, the dual requirements of (1) distinctness,[4] and (2) the proof needed to demonstrate

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of Civil Procedure, the pleading stage should offer a "low hurdle" to clear. *City of New York,* 541 F.3d at 449; *see also In re Sumitomo Copper Litig.,* 104 F. Supp. 314, 319 (S.D.N.Y. 2000) (Pollack, S.J.) ("Allegations of the existence of a RICO enterprise must meet only the 'notice pleading' requirements of" Rule 8(a) (citations omitted)). Nevertheless, district courts "confuse[. . .] what must be pleaded with what must be proved," ignoring that "[i]t is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.,* 742 F.2d 786, 790 (3d Cir. 1984), *cert. denied,* 469 U.S. 1211 (1985). As Judge Posner recognized in *Limestone Devel. Corp. v. Village of Lemont,* 520 F.3d 797, 805 (7th Cir. 2008), civil RICO plaintiffs may "conduct discovery" to flesh out their evidentiary showing of an association-in-fact. *See also Dubai Islamic Bank v. Citibank, N.A.,* 126 F. Supp. 2d 659, 671 (S.D.N.Y. 2000) ("not always . . . reasonable to expect . . . when a defrauded plaintiff frames his complaint he will have available sufficient factual information regarding the inner workings of a RICO enterprise"). Expecting the pleader to allege pre-discovery what he, she, or it can only obtain in discovery is a classic "Catch-22." *See* Joseph Heller, CATCH-22, 47 (Dell 1985) ("He would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. Yossarian was moved very deeply by the absolute simplicity of [the Catch-22.]").

[4] In cases alleging violations of § 1962(c), the Government and civil RICO plaintiffs must "allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 161-162 (2001). A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3). Thus, "by virtue of the distinctness requirement, a corporate entity

(Continued on following page)

an associated-in-fact enterprise "work in tandem to weed out claims dressed up as RICO violations but which are not in fact." *City of New York,* 541 F.3d at 447. The "distinctness" requirement requires the Government or civil RICO plaintiff to allege and prove at trial that the RICO "person" is legally separate from the RICO "enterprise," while the "association-in-fact" requirements ensure that "distinctness" is not achieved by simply adding on entities to the enterprise that do not in fact operate as a "continuing unit" or share a "common purpose." *Id.* (quoting *Turkette,* 452 U.S. at 583). Anything more is superfluous.

Before this Court, however, Petitioner and his *amici* seek to rewrite *Turkette* by unjustifiably adding or substituting the element of an "ascertainable structure" to the factors carefully enumerated by this Court. In effect, they seek judicial immunity for wide

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may not be both the RICO person and the RICO enterprise under [§] 1962(c)." *City of New York,* 541 F.3d at 447 (citation omitted). Nevertheless, "a defendant can clearly be a person under the statute and also be ***part*** of the [association-in-fact] enterprise," because the "prohibition against the unity of person and enterprise applies only when the singular person or entity is defined as both the person and the only entity comprising the enterprise." *United States v. Goldin Indus.,* 219 F.3d 1271, 1275 (11th Cir.) (collecting cases), *cert. denied,* 531 U.S. 1015 (2000); *see also Securitron Magnalock Corp. v. Schnabolk,* 65 F.3d 256, 263 (2d Cir. 1995) (notwithstanding common ownership and a common officer and agent, each distinct corporation could be charged individually as a "person" under § 1962(c) while also being considered jointly as constituting the "enterprise"), *cert. denied,* 516 U.S. 1114 (1996).

swaths of "white-collar" criminal activity, most often schemes to defraud, by limiting RICO's scope to "organized crime."[5] Petitioner advances already soundly rejected arguments to limit RICO that do violence to the statute's plain meaning and are inconsistent with its statutory language, legislative history and public policy. Properly applied, the factors enumerated by this Court in *Turkette* provide carefully crafted tools for a fact-finder to use to determine the existence of an association-in-fact RICO enterprise in a criminal prosecution or civil litigation. *See, e.g., City of New York,* 541 F.3d at 446-451 (association-in-fact of corporations operating as "functioning unit" to deprive city of cigarette tax revenues); *Odom,* 486 F.3d at 552-553 (association-in-fact of corporations "functioned as a continuing unit" to defraud consumers); *Cianci,* 378 F.3d at 84 (association-in-fact of corrupt mayor and confederates and municipal agencies and entities). Another layer of complex criteria, not required by the language of the statute, is unnecessary.

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[5] As this Court observed in *NOW*, 510 U.S. at 260, "[t]he occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in its application to organized crime." *Id.* (citation omitted). The notion that RICO is somehow limited to "organized crime" – however defined – finds no support in the statute's text and is at "odds with the tenor of its legislative history." *H.J. Inc.*, 492 U.S. at 244. As such, this new incarnation of the "organized crime" limitation ought to gain no traction with this Court.

No showing on this record demonstrates that the law as it is does not work well.

B. The Statutory Definition Of "Enterprise" Does Not Require The Government Or Civil RICO Plaintiff To Plead And Prove The Existence Of An "Ascertainable Structure"

As this Court recognized in *Turkette*, "[i]n determining the scope of a statute, we look first to its language." 452 U.S. at 580. Reading RICO is basically a question of the "language of the statute" – what this Court termed "the most reliable evidence of its intent." *Id.* at 593.[6] This Court's principles, consistently applied, are summarized in G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO,* 33 AM. CRIM.

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[6] *See* Henry Friendly, BENCHMARKS 202 (1976) ("(1) read the statute, (2) read the statute, (3) read the statute") (quoting Justice Frankfurter's three rules for interpreting statutes)); Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 533 (1947) ("A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration."); III Roscoe Pound, JURISPRUDENCE, 488-490 (1959) ("specious construction [of statutes] tends to bring law into disrespect; . . . subjects courts to political pressures; [and] invites an arbitrary personal element in judicial administration; [it threatens to make] laws . . . worth little [and to] break down [the] legal order").

L. REV. 1345, 1460-1461 n.441 (1996). So, too, are this Court's recent criminal and civil RICO decisions: *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999); *Beck v. Prupis*, 529 U.S. 494 (2000); *Rotella v. Wood*, 528 U.S. 549 (2000); *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Scheidler v. Nat'l Org. for Women*, 547 U.S. 9 (2006); *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006); and *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008).

Petitioner offers no reason to abandon these principles, and their meaning is unequivocal. This Court's statutory analysis in *Turkette*, 452 U.S. at 580-587, makes manifest, beyond serious cavil, that nothing in Sections 1961, 1962, or 1964 of RICO requires the Government or civil RICO plaintiff(s) to allege or prove the existence of an "ascertainable structure" for the trier of fact to find the "enterprise" element established.[7] The definition of "enterprise" in RICO is ostensive or partially denotative; it is not connotative; its list of examples is illustrative, not exhaustive. *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934).[8] Of the ten definitions listed in Section 1961 of RICO, four utilize "includes" while six use "means."[9] ***"That the draftsman used these***

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[7] *See* Paul Edgar Harold, *Quo Vadis, Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provisions in Criminal and Civil Cases (With a Little Statutory Background to Explain Why)*, 80 NOTRE DAME L. REV. 781, 789 (2005) (analyzing statutory definition of "enterprise": "All that is required is an association of individuals with the purpose of doing whatever criminal activities they plan on doing. No hierarchical structure, no decisionmaking unit, no activities distinct from the racketeering acts, and no far reaching plans or purposes are required by the text.").

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[8] In *Helvering*, 293 U.S. at 125 n.1, this Court stated that the terms "means" and "includes" are not necessarily synonymous, and the distinction in their use is aptly pointed out in RICO: "[One section] . . . gives general definitions of ten terms; of these, three are stated to 'include' designated particular instances, the other seven are stated to 'mean' the definitions subsequently given. [Another section] . . . , in addition to the definitions contained in [the other section,] . . . gives four of which two use the verb 'include' and two the verb 'means.' That the draftsman used these words in a different sense seems clear. The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Accord Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *see also* Reed Dickerson, THE FUNDAMENTALS OF LEGAL DRAFTING, § 7.2 at 99-100 (1965) (distinguishing between connotative definitions that are exhaustive – either "is" or "means" – and denotative definitions that may be exhaustive – "means" – or partial, such as "includes").

[9] For example, § 1961(3) of RICO defines "person" to "include[. . .] any individual or entity capable of holding a legal or beneficial interest in property." Beyond human beings and corporations, how far does this meaning extend? For example, under admiralty law a ship does not "own" property; it is property, but it is also a "person" for purposes of liability. II Thomas A. Russell, ed., BENEDICT ON ADMIRALTY § 21, at 2-1-2-2 (7th ed. 2005) ("A ship is, of necessity, a wanderer. She visits shores where her owners are neither known nor are accessible. . . . The ship is so much an independent enterprise, a juridical aggregate of right and liabilities [that creditors contract or tort may sue her *in rem* rather than her owners.]") (*citing United States v. The Malek Adhel*, 43 U.S. (2 How.) 210, 233-234 (1844)

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words in a different sense seems clear. " *Helvering,* 293 U.S. at 125 n.1 (emphasis added). RICO's plain meaning controls. *Turkette,* 452 U.S. at 580, 593; *United States v. Russello,* 464 U.S. 16, 20 (1983). If similar language reflects similar meaning, *see Reves v. Ernst & Young,* 507 U.S. 170, 177 (1993) (§ 1962(c): "word 'conduct' is used twice"), then, *a fortiori*, different language reflects different meaning, and this is precisely how the circuit courts read Section 1961(4). *See, e.g., United States v. Huber,* 603 F.2d 387, 393-35 (2d Cir. 1979) (rejecting argument that "group of corporations cannot be an enterprise" as stemming from "overly rigid reading of the definitions contained in" § 1961), *cert. denied,* 445 U.S. 927 (1980). *Accord London,* 66 F.3d at 1243-1244 (analyzing language used in § 1961(4) and holding that "two or more legal entities ***can*** form or be part of an association-in-fact RICO enterprise"; collecting cases reaching same result) (emphasis in original); *see also United States v. Warner*, 498 F.3d 666, 694 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 2500 (2008).

Petitioner asserts that in some contexts "includes" means "means" and that Section 1964 of RICO uses "includes, but not limited to" twice, arguing that Congress used "includes" to mean "means" in Section 1961, and that when it meant "including, but not limited to," it knew how to say it. Petitioner

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(Story, J.) ("The vessel which commits the aggression [of piracy] is treated as the offender" and it is subject to forfeiture *in rem* without regard to the innocence of the owners.).

ignores the careful alternative uses of "includes" and "means" in Section 1961 and, had one meaning been intended, one usage would have been adopted. The "short answer [to Petitioner's arguments] is that Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (citation omitted); *see also Sedima,* 473 U.S. at 489 n.8 ("minor departure in wording . . . [does not] indicate a fundamental departure in meaning.").[10]

Petitioner also takes the use of "including, but not limited to" in Section 1964 out of its precise context that fixes its meaning. *See McClulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 415 (1819) ("The word, then, like others, is used in various senses; and, in its construction, the subject, the ***context***, the intention of the person using them, are all to be taken into view.") (emphasis added); *see also Dolan v. U.S. Postal Svc.,* 546 U.S. 481, 486 (2006) ("The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.")

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[10] NASCAT agrees with and adopts the Government's careful exegesis (reading the meaning of words) of the relevant terms; nothing further is necessary on our part. On the other hand, we emphatically reject the Petitioner's eisegesis (reading meaning into a word). The judicial function begins and ends with exegesis; eisegesis invades the legislative function and it violates separation of powers. Moreover, Petitioner's eisegesis is inconsistent with standard organizational theory; it begins and ends with a result-oriented mindset. On general organizational theory, *see generally* Edward Gross & Amitai Etzonini, ORGANIZATIONS IN SOCIETY (1985), the classis text in the area.

Congress's use of "includes" and "means" in Section 1961 occurs in the context of a section of definitions that are separate and apart from Section 1964. Section 1964 is an independent provision authorizing civil relief and it contains no definition section. The parts that use "including, but not limited to" are not parts of a definition but, rather, a series of illustrations as to the scope of the equity power granted to the courts. Out of an abundance of caution, Congress used the phrase so that courts would know that the list was "not exhaustive." S. Rep. No. 91-617, 91st Cong., 1st Sess. 160 (1969); 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan). Petitioner's arguments as to the meaning and scope of Section 1961(4)'s definition of "enterprise" are contrary to this Court's analysis and holding in *Turkette,* 452 U.S. at 580, and numerous circuit court decisions.

C. Nothing In RICO's Legislative History Requires Pleading Or Proof That The "Enterprise" Has An "Ascertainable Structure"

Just as the text of the "enterprise" definition contemplates an expansive view of what constitutes an association-in-fact enterprise, nothing in RICO's legislative history counsels narrowing the expansiveness of the textual definition. *See Turkette,* 452 U.S. at 588-593 (analyzing RICO's legislative history).

To start, in dealing with the legislative history of RICO, this Court repeatedly states that only "clearly expressed legislative intent to the contrary" of clear statutory language will support the narrowing of RICO's text. *See, e.g., NOW,* 510 U.S. at 261. In the case of the association-in-fact enterprise, not only is the legislative history unambiguous, but it, in fact, supports broadly interpreting the statutory language. Regarding RICO's legislative history, the House Report on the Organized Crime Control Act adds much to strengthen the textual analysis given above: It states that because the definition of "enterprise" includes "associations in fact . . . infiltration of any associative group by any individual or group capable of holding a property interest can be reached." H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4032.[11] This language

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[11] The Fifth Circuit takes this language in the House Report and the language of the statute itself to find that association-in-fact enterprises can be composed of both legal entities and individuals:

> Appellants contend that because the indictment described the enterprise as "a group of individuals associated in fact with various corporations," the enterprise alleged did not fall within the literal bounds of the statutory classifications. We reject this claim. . . .
>
> Use of the verb "includes" in the statutory definition indicates congressional intent not to limit a RICO enterprise to the specific categories listed; rather, the

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contemplates a broad understanding of what constitutes an association-in-fact, and Petitioner is hard pressed to argue that Congress believed limitations to the association-in-fact concept existed beyond what inhered in the word "association."

As this Court found in *Turkette,* RICO's legislative history amply shows Congress did not intend to limit the association-in-fact enterprise concept only to "organized crime." Conceptually, the House Report provided, and RICO's drafters along with this Court understood, that the association-in-fact enterprise provision allowed for the infiltration of "any associative group" to be punished.

D. Petitioner's Arguments Are Contrary To The Substance And Meaning Of This Court's Decision In *Turkette*

In *Turkette,* defendants were alleged to have formed an associated-in-fact enterprise within the meaning of Sections 1961(4) and 1962(c).[12] In the

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> language "reveals that Congress opted for a far broader definition of the word 'enterprise.'" Moreover, the House report accompanying RICO stated that "enterprise" included "associations in fact, as well as legally recognized associative entities. Thus infiltration of any associative group by any individual or group capable of holding a property interest can be reached."

United States v. Thevis, 665 F.2d 616, 625 (5th Cir.) (*quoting* House Report), *cert. denied*, 459 U.S. 825 (1982).

[12] In *Turkette,* 452 U.S. at 578-579, a nine-count indictment charged Turkette and twelve others with conspiracy to conduct

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words of the statute, they were alleged to have been a "group of individuals associated in fact" for the purpose of engaging in acts constituting "a pattern of racketeering activity." The First Circuit agreed with defendants that RICO was designed "solely to protect legitimate business enterprises from infiltration by racketeers and that RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise." 452 U.S. at 579-580. This Court reversed, holding that a "group of individuals associated in fact" was an enterprise under RICO even if the purpose of the enterprise was exclusively criminal. *Id.* at 593.

In the course of its analysis, this Court refuted various analytic mistakes by the court of appeals. The First Circuit's conclusion that RICO did not apply to

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and participate in the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activity. The indictment described the RICO enterprise as "a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings. . . ." *Id.* After a six-week trial, "in which the evidence focused upon both the professional nature of th[e] organization and the execution of a number of distinct criminal acts," *id.* at 579, Turkette was convicted on all nine counts. *See generally* Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 660-663 (1989) (discussing *Turkette*).

wholly illegal enterprises depended in part on its reasoning that a contrary holding would render portions of the statute superfluous. The court of appeals had stated:

> If "a pattern of racketeering" can itself be an 'enterprise' for purposes of [§] 1962(c), then the two phrases 'employed by or associated with any enterprise' and 'the conduct of such enterprise's affairs through [a pattern of racketeering activity]' add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises.

Turkette, 452 U.S. at 582 (quoting *United States v. Turkette,* 632 F.2d 896, 899 (1st Cir. 1980) (alteration in original)). This Court was at pains to correct the First Circuit's reading of the statute. It wrote:

> [The court of appeals' conclusion] is based on a faulty premise. That a wholly criminal enterprise comes within the ambit of the statute does not mean that a "pattern of racketeering activity" is an "enterprise." In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. ***The former is proved***

> ***by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.*** The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. ***The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages.***

Id. at 583 (emphasis added; citation omitted).

In context, this passage from *Turkette* is easy to understand. The court of appeals mistakenly conflated the term "enterprise" with the term "pattern of racketeering activity." This Court pointed out that the terms refer to two concepts that are "separate and apart" from one another: The "enterprise" is the actor, and the "pattern of racketeering activity" is an activity in which that actor engages. These separate concepts can be expressed grammatically: As used in the second italicized passage in *Turkette*, "enterprise" is the subject and "pattern of racketeering activity" is part of the predicate. (Actions that form the "pattern of racketeering activity" are often referred to as "predicate" acts, though likely not in the grammatical sense.) This Court further explained that proof of a "pattern of racketeering activity" is not, by itself, proof of an "enterprise." *Id.* "Enterprise" and "pattern of racketeering activity" are separate elements that require separate proof. In the words of this Court, "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* (stating that "[w]hile the proof used to establish these separate elements [of 'enterprise' and 'pattern of racketeering activity'] may in particular cases coalesce, proof of one does not necessarily establish the other").[13]

To read this Court's statement in *Turkette* as requiring that an associated-in-fact enterprise have a "structure" beyond that necessary to carry out its pattern of illegal racketeering activities is not only to misread the particular passage of *Turkette,* it is also fundamentally to misunderstand *Turkette's* holding.

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[13] *Turkette* left intact the Fifth Circuit's holding in *United States v. Elliott,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978):

> In defining "enterprise," Congress made clear that the statute extended beyond conventional business organizations to reach "any . . . group of individuals" whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes. The statute demands only that there be association "in fact" when it cannot be implied in law. ***There is no distinction, for "enterprise" purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network.***

Id. at 898 (emphasis added); *see also Goldin Indus.,* 219 F.3d at 1275.

The First Circuit in *Turkette* had read RICO to impose liability only when a legitimate business was infiltrated by a criminal enterprise, meaning that RICO did not impose liability on purely criminal enterprises. Needless to say, this Court reversed. As a result, the Government has widely and successfully used RICO to bring Mafia families to their knees.[14]

To require that an associated-in-fact enterprise have a "structure" beyond that necessary to carry out its racketeering activities would be to require precisely what this Court in *Turkette* held that RICO does ***not*** require.[15] NASCAT asserts that the "ascertainable

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[14] PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE IMPACT, ORGANIZED CRIME TODAY 133-135 (1986); James B. Jacobs, BUSTING THE MOB: THE UNITED STATES V. COSA NOSTRA 23-24 (1994); Julie Gunnigle, *Birds of* A *Feather RICO: Trying Partners in Crime Together,* 34 SYRACUSE J. INT'L L. & COM. 41, 104-106 (2006) (summarizing empirical data on selected Mafia families and recommending a RICO-type statute to the United Kingdom to fight terror more effectively).

[15] The Eighth, Tenth, Fourth and Third Circuits read the language in *Turkette* to require that an association-in-fact enterprise have some kind of "ascertainable" separate structure. *See, e.g., Asa-Brandt, Inc. v. ADM Investor Svcs., Inc.,* 344 F.3d 738, 752 (8th Cir. 2003); *United States v. Sanders,* 928 F.2d 940, 944 (10th Cir.), *cert. denied,* 502 U.S. 845 (1991); *United States v. Tillett,* 763 F.2d 628, 632 (4th Cir. 1985); *Riccobene,* 709 F.2d at 223-224.

The Seventh Circuit requires "some" kind of structure but does not require that it be a "separate" structure. *See, e.g., Limestone Devel.,* 520 F.3d at 804-805; *Richmond v. Nw. Cassel L.P.,* 52 F.3d 640, 644 (7th Cir. 1995); *see also United States v. Rogers,* 89 F.3d 1326, 1337-1338 (7th Cir.) (imposing "some" structural requirements, but concluding that it would be "nonsensical to require proof that an enterprise had purposes or

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structure" requirement represents yet another attempt to improperly limit RICO's deliberately broad reach.[16]

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goals separate and apart from the pattern of racketeering activity"), *cert. denied,* 519 U.S. 999 (1996). The Sixth Circuit also falls into this middle group. *See, e.g., United States v. Tocco,* 200 F.3d 401, 425 (6th Cir. 2000).

By contrast, five circuits rightly reject any requirement of an "ascertainable structure" for an associated-in-fact enterprise. *See, e.g., Odom,* 486 F.3d at 551 (Ninth Circuit: "We take this opportunity to join the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise") (citing cases); *City of New York,* 541 F.3d at 447-448 (Second Circuit has rejected "ascertainable structure" requirement); *Nascimento,* 491 F.3d at 32-34 (same; collecting First Circuit decisions); *Cianci,* 378 F.3d at 82 (First Circuit has "approved [jury] instructions based strictly on *Turkette*'s explanation of how a criminal enterprise might qualify as a RICO enterprise") (citation omitted); *Perholtz,* 842 F.2d at 354 (concluding that enterprise is "established by common purpose among the participants, organization, and continuity"); *United States v. Cagnina,* 697 F.2d 915, 921 (11th Cir. 1983) ("*Turkette* did not suggest that the enterprise must have a distinct, formalized structure."); *United States v. Bagaric,* 706 F.2d 42, 56 (2d Cir. 1983) (stating that "it is logical to characterize any associative group in terms of what it ***does***, rather than by abstract analysis of its structure" (emphasis in original), *abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249 (1994).

[16] The "ascertainable structure" limitation originated in *United States v. Bledsoe,* 674 F.2d 647, 665 (8th Cir.), *cert. denied,* 459 U.S. 1040 (1982), which stated that such structure "might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes." Uncomfortable with RICO's breadth, as drafted by Congress, beyond organized crime or its

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Such a requirement would necessitate that the enterprise have a structure to serve ***both*** illegal racketeering activities and legitimate activities. In other words, it would require – as the First Circuit sought to require in *Turkette* – that the enterprise have a structure serving both illegitimate ***and*** legitimate purposes. But this Court reached the opposite result, holding that a purely criminal enterprise can be an associated-in-fact enterprise within the meaning of RICO. *See also Cedric Kushner Promotions,* 533 U.S. at 164-165 (stating that RICO "protects the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle'

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infiltration of legitimate business, *Bledsoe* (like the First Circuit in *Turkette*) initially sought to confine RICO to the infiltration of legitimate business by "organized crime." The First Circuit's effort was rejected by this Court in *Turkette,* but *Bledsoe* represented the Eighth Circuit's effort to confine RICO to its supposed origins in the effort to take the measure of the families of the Mafia, and "structure" was its chosen technique. *Bledsoe,* 674 F.2d at 664 ("the command system of a Mafia family is an example of this type of structure"). In other words, the "ascertainable structure" requirement advanced here by Petitioner and his *amici* is nothing more than the discredited "organized crime" limitation called by another name. Whatever it is called, it is not how Congress consciously drafted RICO, nor is it consistent with this Court's uniform jurisprudence. *See Bridge,* 128 S. Ct. at 2145: "Whatever the merits of petitioner's arguments [to limit RICO with a reliance requirement] as a policy matter, we are not at liberty to rewrite RICO to reflect their – or our – views of good policy. We have repeatedly refused to adopt narrowing construction of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."

through which 'unlawful . . . activity is committed'") (ellipsis in original; citations omitted).

Further, to require that an associated-in-fact enterprise have an "ascertainable structure" – whether that structure serves both legitimate and illegitimate activities ***or*** only illegitimate activities – is to misread the language of RICO and this Court's analysis in *Turkette*. As the First Circuit now states, such a requirement improperly narrows the definition of an associated-in-fact enterprise because criminal enterprises "may not observe the niceties of legitimate organizational structures." *Patrick,* 248 F.3d at 19. An associated-in-fact enterprise must, of course, exist, as required by the statute and as explained in *Turkette*. But nothing in the statute or this Court's jurisprudence requires that the enterprise have an "ascertainable structure." *See Odom,* 486 F.3d at 548-553.

E. The Lower Courts Have Properly Applied The Three Factors Enumerated By This Court In *Turkette* To Determine Whether RICO Association-In-Fact Enterprises Have Been Alleged And/Or Proven Without Reference To An "Ascertainable Structure" Requirement

As recently recognized and applied by the Second Circuit in *City of New York,* 541 F.3d at 447-451, and by the Ninth Circuit in *Odom,* 486 F.3d at 548-553, both civil RICO cases, and by the First Circuit in *Nascimento,* 491 F.3d at 32-34, the appeal from a criminal RICO conviction, this Court's careful articulation in *Turkette* of the criteria for an associated-in-fact enterprise provide the principal tools "a fact-finder should use to distinguish a RICO enterprise from an ad hoc criminal confederation." *Cianci,* 378 F.3d at 84. In numerous reported cases decided since 1981, the lower courts have successfully applied those requirements to associations-in-fact enterprises involving individuals, corporate entities and combinations of both, just as the trial court, jury and Second Circuit did in this case.

In this case, the evidence introduced by the Government at trial showed that "members of [P]etitioner's crew had particular roles, protected their identities by using false names, engaged in advance surveillance and planning (including gathering the necessary tools), and divided the robbery proceeds in a systematic fashion in which members engaging in higher risk roles were compensated with greater shares." Brief for the Chamber of Commerce of the United States and McKesson Corporation As *Amici Curiae* in Support of Neither Party, at 25-26 (Nov. 22, 2008). "These facts evince oversight and coordination activities, including coordination among members to avoid apprehension." *Id.* at 26. Thus, even in those circuits that have adopted the "ascertainable structure" requirement for proving an association-in-fact enterprise at trial, the evidence in this case is more than sufficient to establish the "enterprise" element. *See, e.g., United States v. Eppolito,* 543 F.3d 25, 51-57 (2d Cir. 2008); *City of New York,* 541 F.3d at 450-451 (scheme to avoid paying cigarette taxes to city, which sufficiently alleged a "continuing unit" by alleging that corporations "entered profit sharing and employment agreements and that they have 'interlocking financial and management agreements'"; in addition, city sufficiently alleged the "roles" played by defendants in operating or managing enterprise); *Nascimento,* 491 F.3d at 32-33 (members of "street gang" shared weapons, "self-identified as belonging to" the gang, and members "kept tabs on one another"); *Odom,* 486 F.3d at 552-553 (contracting entities "established mechanisms" for communicating "financial information," "agreed to promote" each other's products, and "functioned as a continuing unit"); *United States v. Connolly,* 341 F.3d 16, 27 (1st Cir. 2003) (members of criminal gang "join[ed] forces to protect themselves from prosecution," "shared resources and revenue" and had "a sense of membership"); *United States v. Kehoe,* 310 F.3d 579, 587 (8th Cir. 2002) (White Supremicist group; leader "possessed and controlled the majority of the proceeds from the enterprise's illegal activities" and "he distributed the remainder to his cohorts"), *cert. denied*, 538 U.S. 1048 (2003); *Rogers,* 89 F.3d at 1337 (drug ring; "differentiation among roles can provide the requisite 'structure' to prove the element of 'enterprise'") (citation omitted); *United Healthcare Corp. v. Am. Trade Ins. Co.,* 88 F.3d 563, 570 (8th Cir. 1996) (associated-in-fact corporations "operated as a continuing business unit . . . in its insurance sales and marketing activities"). Thus, Petitioner improperly seeks to improperly

tack onto the statute an element that would not change the result in his own case.

F. Petitioner's Arguments Are Contrary To RICO's Purpose And Public Policy

Finally, as this Court stated in *Turkette,* 452 U.S. at 593, the policy consequences of the "ascertainable structure" limitation that Petitioner urges are relevant. "Consequences cannot alter statutes, but may help to fix their meaning." *In re Rouss,* 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917) (Cardozo, J.). NASCAT submits that an "ascertainable structure" requirement tends to thwart, rather than further, the well-established purposes of RICO. As this Court held in *Turkette,* 452 U.S. at 578, RICO reaches purely criminal enterprises as well as legitimate ones. To the extent an "ascertainable structure" requirement is construed to require an organization engaging in both legitimate business activity ***and*** predicate acts of racketeering, *Turkette's* holding is flouted.

Moreover, even with respect to purely criminal enterprises, to require an "ascertainable structure" with an existence beyond that necessary to perform the predicate acts is not mandated by RICO's language and it improperly limits its scope. As the Second Circuit stated in *United States v. Mazzei,* 700 F.2d 85, 89 (2d Cir.), *cert. denied,* 461 U.S. 945 (1983), such a requirement "would lead to the anomalous result that a large scale underworld operation which engaged solely in trafficking of heroin would not be subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sales of contraband drugs and illegal handguns arguably could be prosecuted under RICO." As the District of Columbia Circuit concurred in *Perholtz,* 842 F.2d at 353, Petitioner's reading of Section 1961(4) "would lead to the bizarre result that only criminals who fail to form corporate shells to aid their illicit schemes could be reached by RICO. This interpretation hardly accords with Congress' remedial purposes: To design RICO as a weapon against the sophisticated racketeer as well as (and perhaps more than) the artless." As the Seventh Circuit said in *Masters,* 924 F.2d at 1367, "[i]t would be ironic if the RICO statute, aimed primarily at criminal enterprises such as the Mafia and its many petty imitators, was more effective against legal enterprises because the latter have a more perspicuous, articulated structure." *Accord Rogers,* 89 F.3d at 1337; *Atlas Pile Driving Co. v. DiCon Finan. Co.,* 886 F.2d 986, 995 n.7 (8th Cir. 1989) ("[W]e think it unwise policy to permit individuals to escape the reach of RICO through the simple artifice of incorporating"); *McCullough v. Suter,* 757 F.2d 142, 143-144 (7th Cir. 1985) ("[W]e do not suppose that 'Murder Inc.' was really a corporation; and we cannot believe that Congress would have wanted gangsters [associated in fact] to be able to escape the clutches of section 1962(c) just by avoiding the corporate form").[17]

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[17] In *Masters*, 924 F.2d at 1366, in which the Seventh Circuit affirmed defendant's RICO conviction, the alleged

(Continued on following page)

Finally, a principal and wholely proper use of RICO by the Government is to prosecute political corruption cases where the enterprise is usually defined as the governmental agency, political office, and the like. *See* G. Robert Blakey & Thomas Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God is This the End of RICO?,"* 43 VAND. L. REV. 851, 1020 (1990) (reporting that the largest

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enterprise was described as an "informal consortium of a law firm and two police departments with the three individuals who are the defendants." On appeal, the defendants argued that a RICO enterprise, "unless it is a legal entity such as an individual, a partnership, or a corporation, can only be a 'union or group of ***individuals***' which Masters' law firm, the Willow Springs Police Department, and the Cook County Sheriff's Police Department are not." *Id.* Justice Posner stated that "[t]he argument has repeatedly and we think correctly been rejected," *id.*, citing the Ninth Circuit's decision in *United States v. Feldman*, 853 F.2d 648, 655 (9th Cir. 1988), and the D.C. Circuit's decision in *Perholtz*, 842 F.2d at 352-53. Justice Posner explained:

> The statute says "'enterprise' includes" – not "'enterprise' means." The point of the definition is to make clear that it need not be a formal enterprise; "associated in fact" will do. Surely if three individuals can constitute a RICO enterprise, as no one doubts, then the larger association that consists of them plus entities that they control can be a RICO enterprise too. Otherwise while three criminal gangs would each be a RICO enterprise, a loose-knit merger of the three, in which each retained its separate identity, would not be, because it would not be an association of individuals. That would make no sense.

924 F.2d at 1366.

category of criminal RICO prosecutions involved political corruption). *See, e.g., United States v. McDade,* 28 F.3d 283, 295-297 (3d Cir. 1994) (upholding association-in-fact RICO enterprise consisting of congressman, his two offices and congressional subcommittees that he chaired), *cert. denied*, 455 U.S. 910 (1982); *United States v. Dischner,* 974 F.2d 1502, 1511 (9th Cir. 1992) (upholding association-in-fact enterprise consisting of municipal officials, office of mayor and department of public works), *cert. denied,* 507 U.S. 923 (1993); *United States v. Angelilli,* 660 F.2d 23, 31-33 (2d Cir. 1981) ("We view the language of § 1961(4), . . . as unambiguously encompassing governmental units, . . . and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities."), *cert. denied*, 455 U.S. 910 (1982); *see also* G. Robert Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 298-299 (1982) (collecting decisions). In *Cianci,* 378 F.3d at 78-88, where the First Circuit affirmed the RICO convictions of the mayor of Providence, Rhode Island, and associates who operated affairs of an associated-in-fact enterprise consisting of themselves, the city and its agencies and entities to enrich themselves, the court stated that "[a] RICO enterprise animated by an illicit common purpose can be comprised of an association-in-fact of municipal entities and human members when the latter exploits the former to carry out that purpose." *Id.* at 83. After surveying the above-referenced decisions from the Second, Third and Ninth Circuits, the First Circuit stated: "In each of these cases, the groupings of individuals and corporate or municipal entities were sufficiently organized and devoted to the alleged illicit purposes that the resulting whole functioned as a continuing unit. The common purpose was dictated by individuals who controlled the corporate or municipal entities' activities and manipulated them to the desired illicit ends." *Id.*

RICO's important role in combating political corruption would effectively end if this Court were to accept Petitioner's attempts to narrow the broad definition of "enterprise" found in section 1961(4) and explicated in *Turkette*.

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CONCLUSION

For the reasons stated herein, NASCAT respectfully submits that the decision of the Court below affirming Petitioner's RICO conviction should be affirmed.

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Respectfully submitted,

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